

1 APPELLATE COURT NO. 71595
2 IN THE COURT OF CRIMINAL APPEALS
3 OF THE STATE OF TEXAS
4 AT AUSTIN
5

6 RICK ALLAN RHOADES,

7 Appellant

8 VS.

9 THE STATE OF TEXAS,

10 Appellee.
11

12 APPEAL FROM 179TH DISTRICT COURT OF HARRIS COUNTY,
13 TEXAS

14 Judge J. Michael Wilkinson Presiding
15

16
17 STATEMENT OF FACTS

18 VOLUME IX OF 40 VOLUMES
19
20
21

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25 Houston, Texas 77002

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1 CAUSE NO. 612408

2 STATE OF TEXAS IN THE 179TH DISTRICT COURT

3 VS. OF

4 RICK ALLAN RHOADES HARRIS COUNTY, T E X A S

5
6 A P P E A R A N C E S:

7 For the State: Ms. Carol Davies
8 Assistant District Attorney
Harris County, Texas

9 For the Defendant: Mr. James Stafford
10 Ms. Deborah Kaiser
11 Attorneys at Law
Houston, Texas

12
13 BE IT REMEMBERED that upon this the
14 4th day of August A.D. 1992, the above entitled
15 and numbered cause came on for continued voir
16 dire examination of prospective jurors before
17 the Honorable J. Michael Wilkinson, Judge of the
18 179th District Court of Harris County, Texas;
19 and the State appearing by counsel and the
20 Defendant appearing in person and by counsel,
21 the following proceedings were had, viz:
22
23
24
25

1 MARION DALE HARVILL,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number four
6 on panel number two, Mr. Marion Dale Harvill.
7 Is that the correct pronunciation?

8 A. Yes, sir.

9 Q. I am going to ask you a few questions
10 before we get started. You were asked if you
11 were a lawyer/rancher, and you said you were a
12 rancher/lawyer. I noticed you had worked with a
13 couple of major firms in Houston. I believe it
14 was Kronzer, Abraham and Baker Botts?

15 A. Yes.

16 Q. Can you give us the time frames when
17 you worked there?

18 A. I came directly out of law school in
19 1964 to Baker Botts Shepherd and Coates. I was
20 with Baker Botts Shepherd and Coates until July 6
21 of 1966. And I was with the Brown Kronzer firm
22 from that time until May 1st of 1973.

23 Q. May 1, '73, you left that firm and?

24 A. Went out on my own and formed my own
25 law firm after that.

1 Q. What kind of law did you practice?

2 A. Okay, from 1973 until October first,
3 1975, I was a solo practitioner. I practiced
4 personal injury, plaintiffs personal injury law,
5 which was ninety some odd percent of the cases I
6 was a litigator. In October first, 1975, G. P.
7 Hardy, III came over from Vinson, Elkins, and we
8 formed the firm.

9 Q. You are that Harvill and Hardy.

10 A. That's right. Judge Scirs used to
11 call us Laurel and Hardy.

12 Q. You were Harvill and Hardy until when?

13 A. I withdrew from the firm on May 1st of
14 1985, and I set up shop out in the FM 1960 area
15 where I lived, and I have been out there ever
16 since.

17 Q. I know there were a couple of former
18 DA's at one time or another who went through
19 there as associates. Did you have various
20 associates over the years with Harvill and Hardy?

21 A. Yes.

22 Q. I can't recall any names right now.

23 A. There is one in particular that I know
24 of. If you need his name. Pat McKennah.

25 Q. Oh, yeah. I forgot where he went

1 after that. So, plaintiffs personal injury.
2 Plaintiffs who have personal injury cases often
3 pick up criminal cases on the side while theirs
4 is pending. Where did you refer those out to?

5 A. I didn't have that many because I just
6 didn't. Most of the cases that I had were
7 referred from other lawyers, to start with. And
8 any that came up would have -- there was not any
9 particular one person that they went to. I
10 know, I don't recall if I ever referred one
11 period.

12 Q. Did you ever appear in criminal court
13 with any of those people?

14 A. No, I did not.

15 Q. You still keep a law office open?

16 A. I have a law office open, and I have
17 one case that is pending in the Texas Supreme
18 Court that will be argued October 20th that I
19 keep. I get calls. A young lawyer that was
20 with me downtown named Scot Saines gets those
21 cases. I just tell the people I don't do them
22 day to day anymore and suggest, if they want a
23 good lawyer, they call Scott Saines.

24 Q. Your cattle ranching activity, what
25 county?

1 A. I have ranching operations in North
2 Texas in Montague County, Texas, which is my
3 home county. I have some in Grimes County. I
4 have some in Hardin County. And I have some in
5 Harris County.

6 Q. Where was your wife a legal secretary?

7 A. She worked for a lawyer named Graham
8 Moore, who is now deceased. He became deceased
9 at about age thirty-seven. He was primarily a
10 divorce lawyer. I think that is all he did
11 except he may have gotten a few plaintiffs
12 personal injury cases.

13 Q. Five children. They are scattered
14 everywhere.

15 A. Yes, sir.

16 Q. One is with a law firm in Los Angeles?

17 A. Yes, sir.

18 Q. One is in Maryland.

19 A. Yes, sir.

20 Q. Where is Belmont?

21 A. Belmont is in Nashville, Tennessee.
22 That is my musician.

23 Q. Previously on one criminal jury?

24 A. Yes, sir.

25 Q. Seven or eight years ago. A burglary

1 case. Do you recall what court that was in?

2 A. It was Frank Price, visiting judge was
3 the judge, but I cannot recall which.

4 Q. I am amazed that you remember Frank.
5 Did you know Frank from before or something?

6 A. Yes. He ruled against me one time in
7 a civil case and we reversed him on appeal.

8 MR. STAFFORD: He has never forgiven
9 you.

10 A. Fulbright and Jaworski and I did
11 against a Dallas lawyer.

12 Q. You actually completed a Michner book.

13 A. Yes. It was a struggle, but I did.

14 Q. High school friend went to prison for
15 what offense, do you recall?

16 A. You know, I do not know. That is just
17 hearsay. I have never spoken to him about it,
18 but it seems like it was some kind of an
19 oilfield theft of some kind.

20 Q. Pages eight and nine of this
21 questionnaire list statements and either have
22 you check the one which best summarizes your
23 views about capital punishment and the death
24 penalty or has you check whether you agree or
25 disagree with the statement they write. In

1 summarizing these two pages, it appears that you
2 wish capital punishment weren't necessary, but
3 you feel it is necessary for some offenses. Is
4 that correct?

5 A. That is correct.

6 Q. At any rate, your decision on whether
7 or not the death penalty should be assessed
8 would depend solely on the facts and
9 circumstances of the individual case?

10 A. Yes, sir, absolutely.

11 Q. You are very familiar with the general
12 principles we had talked about, presumption of
13 innocence, burden of proof on the State to prove
14 the case beyond a reasonable doubt?

15 A. Yes, sir.

16 Q. Defendant's failure to testify is not
17 to be considered as any evidence against him,
18 all those things?

19 A. Yes, sir.

20 Q. Of course you went through that in
21 1984, 1985 case where you sat on the jury?

22 A. Yes, sir.

23 Q. You probably were more aware than most
24 folks we get in here, aware of the statutory
25 scheme we have in Texas on capital murder

1 offenses, exactly what kind of offenses can be
2 elevated from murder to capital murder?

3 A. My knowledge of that was just very
4 general, just about like any other citizen would
5 have knowledge just from what I read or hear,
6 but I did not have any legal knowledge about
7 that.

8 Q. I read off those six different
9 categories where intentional taking of a life
10 plus an aggravating factor makes the offense of
11 capital murder, police officer murdered, the
12 murder for hire, the murder while in the course
13 of committing another felony, murder of an
14 employee of a penal institution while
15 incarcerated, murder while escaping and the
16 killing of two or more people, murdering two or
17 more people in the same criminal transaction.
18 Are all those kinds of offense that you think
19 should be capital murder offenses?

20 A. In the right circumstances, the right
21 facts, I would say yes.

22 Q. And everything we ask you is going to
23 hinge, of course, on individual circumstances
24 that you hear in a case on trial. When these
25 people are talking to you, by the way, they are

1 not going to be referring to this case
2 specifically, they are going to be talking in
3 hypothetical terms. You did understand that if
4 anybody is convicted of the offense of capital
5 murder there are only two possible punishments,
6 death penalty or life imprisonment?

7 A. Yes, sir.

8 Q. We had talked about the possibility of
9 lesser included offenses may arise, depending on
10 the testimony from the witness stand. Do you
11 recall whether or not ya'll had an option
12 electing among lesser included offenses in that
13 case you tried seven or eight years ago?

14 A. If we did, I don't recall that we did.

15 Q. I believe both sides touched on lesser
16 includeds which could be anything from murder to
17 voluntary manslaughter, involuntary
18 manslaughter, negligent homicide, coming down
19 the line from capital murder, first, second and
20 third degree felonies, class A misdemeanor, all
21 the way down?

22 A. Right.

23 Q. If the jury finds the defendant guilty
24 of capital murder, as I said before, it's
25 mandatory life or death. Were you familiar with

1 the scheme that we have in punishment on a
2 capital murder case, not the jury voting on life
3 or death but on answering certain questions put
4 to them, special issues?

5 I am going to remind you to speak up.

6 A. Yes.

7 Q. She has to take it down.

8 A. I was impressed with the kindness of
9 that statute.

10 Q. How do you mean the kindness of the
11 statute?

12 A. It means that you have to.

13 Q. Oh, the insulation of the jury?

14 A. The insulation of the jury.

15 Q. It works both ways because the judge
16 is kind of isolated also.

17 A. Exactly.

18 Q. Let's refer over here. We have them
19 on the board. I don't know if you could see
20 those yesterday when we were talking about
21 them. This only comes into play in that second
22 stage of trial after you have heard evidence in
23 the second stage if the jury has found someone
24 guilty of capital murder. First one asks you:
25 Do you find from the evidence beyond a

1 reasonable doubt that there is a probability the
2 defendant would commit criminal acts of violence
3 that would constitute a continuing threat to
4 society. This is the estimation of future
5 dangerousness of a defendant. By probability we
6 mean more likely to occur than not. The jury
7 would have in front of them all kinds of
8 information by that time. I would instruct the
9 jury that they should consider all the evidence
10 admitted at the guilt or innocence stage and at
11 the punishment stage, including evidence of a
12 defendant's background or character or the
13 circumstances of the offense that militate for
14 or mitigate against the imposition of the death
15 penalty when they are deciding that issue. It
16 takes all twelve jurors agreeing unanimously
17 that the answer should be yes. It takes ten or
18 more jurors agreeing to have a no answer. If
19 the jury answers that no, there is no
20 probability, that is the end of it, I assess
21 life imprisonment. If they answer yes, there is
22 a probability, then you continue on to number
23 two. Number two is asking whether or not,
24 taking into consideration all the evidence,
25 including the circumstances of the offense, the

1 defendant's character and background, personal
2 moral culpability of the defendant, whether or
3 not there is a sufficient mitigating
4 circumstance or circumstances to warrant that a
5 sentence of life imprisonment rather than a
6 death penalty be imposed. You are considering
7 everything you have heard, all the way through,
8 including whatever mitigating evidence there
9 might have been. Our courts haven't told us
10 exactly what is per se mitigating circumstances
11 except for mental retardation, but we know that
12 a lot of other things can be mitigating. And
13 not to give you a complete laundry list because
14 I don't know what all they might be, but we know
15 they can include such things as child abuse, a
16 defendant's previous good behavior while in
17 prison or jail, an exceptionally unhappy
18 childhood, economic deprivation, childhood drug
19 abuse, age, voluntary intoxication, drug
20 dependency, illiteracy, lay opinion testimony or
21 psychiatric opinion testimony that a defendant
22 on trial would not be a danger in the future.
23 All those kind of things may be mitigating kinds
24 of circumstances. We can't ask you exactly what
25 you think is mitigating circumstances or isn't

1 and exactly what kind of value. We don't know
2 what is going to come into effect in the trial.

3 A. Right.

4 MR. STAFFORD: I object again. We
5 could not ask him what is mitigating to him and
6 what effect he would give it.

7 BY THE COURT:

8 Q. We can't commit you to exactly -- let
9 me rephrase it. We can't commit you to exactly
10 what all these kinds of things out there. I
11 don't know, there could be thousands of
12 different kinds of mitigating circumstances, I
13 don't know. And we can't commit you as to
14 exactly how much weight you would give any
15 particular mitigating circumstance. We want to
16 make sure that we have jurors who will look at
17 all the evidence and, based on everything they
18 have, decide whether or not there is enough
19 there to warrant a life imprisonment sentence
20 rather than death even if the jury has found
21 there is a probability in number one that the
22 defendant would commit criminal acts of violence
23 that would constitute a continuing threat to
24 society. You understand where we are coming
25 from?

1 A. Yes, sir.

2 Q. It takes all twelve jurors unanimously
3 agreeing the answer should be no. It takes ten
4 or more to return a yes answer. So if they have
5 already answered number one yes and answered
6 number two yes, I impose a life sentence. If
7 it's unanimous as to number one with a yes
8 answer, unanimous number two a no answer, there
9 is nothing mitigating here that would warrant a
10 life imprisonment rather than death, then I
11 impose the death penalty.

12 A. Yes, sir.

13 Q. Simple and confusing all at the same
14 time, but you get to know in advance exactly
15 what I am going to do if you answer those
16 questions in a certain way.

17 A. Yes, sir.

18 Q. One of the things that we are trying
19 to assure ourselves during this process is
20 someone doesn't automatically answer those one
21 way or the other. Want to make sure that a
22 potential juror is not predisposed to always
23 answer a certain way to insure either that a
24 death penalty results or that life imprisonment
25 results.

1 Is there anything about your views
2 regarding the death penalty and capital
3 punishment which would prevent or substantially
4 impair the performance of your duties as a juror
5 in accordance with the instructions I would give
6 you and your oath as a juror?

7 A. No, sir.

8 Q. Can you see that how under some
9 certain circumstances question number one could
10 be answered yes and sometimes no?

11 A. Yes, I do.

12 Q. And the same as to number two?

13 A. Yes, sir, I do.

14 THE COURT: Ms. Davies.

15 EXAMINATION BY THE STATE

16 BY MS. DAVIES:

17 Q. This is kind of an interesting, unique
18 situation for us, Mr. Harvill, because we rarely
19 have somebody sitting where you are who has had
20 as much experience in the legal system.

21 A. Yes.

22 Q. At the same time, I suspect it's just
23 as unique for you because not many people --
24 even given your experience -- have the occasion
25 to actually confront the possibility of being

1 involved in a death penalty.

2 A. That is true.

3 Q. How do you feel about that?

4 A. I feel like it's a very heavy burden,
5 that the people that actually serve are going to
6 have to take the job very seriously and they are
7 going to have to look at all the facts and the
8 circumstances and not make any decision
9 lightly. They are going to have to do it based
10 upon evidence and based upon facts and
11 circumstances, and then they are going to have
12 to live with whatever decision they make.

13 Q. I would agree with you. I don't think
14 either party in this case would want anybody on
15 the jury who didn't take this seriously. I will
16 be asking for the death penalty, so we are, as
17 we talk about it today -- I guess what I would
18 really like to know is if I had met you three
19 days ago in just a casual social situation and
20 we had been engaged in a conversation about the
21 situation, crime in the community and death
22 penalty, how would you have described your
23 attitude toward the death penalty, its necessity
24 or lack of necessity?

25 A. If friend or neighbor had asked me or

1 an acquaintance had asked me, I would have
2 simply said that I feel it's unfortunate that it
3 is necessary, but I feel that it is necessary
4 and that our society is such that at this point
5 in time I believe that it should be in an
6 appropriate case available for law enforcement.

7 Q. Are there any types of cases to your
8 way of thinking that are the first ones that
9 come to your mind that are the appropriate types
10 of cases for the death penalty?

11 A. I guess my attitude is one -- I don't
12 know why, but I am basically a person who tends
13 to agree more than disagree with where we are
14 with respect to things, and I can't think of
15 anything that has been mentioned to me as being
16 a capital murder situation that could not be
17 appropriate for a death penalty. And whether it
18 is appropriate or not would depend on the facts
19 and individual personalized circumstances in a
20 particular case.

21 Q. That is exactly what the law would
22 anticipate should be the appropriate kind of
23 measure. We talk about these things in the
24 abstract. As you said, if a friend or neighbor
25 had asked you about it. Now your're confronted

1 with the reality, and I assume you gave it a
2 little thought last night. Do you feel
3 differently at all knowing that, hey, I am going
4 to have to deal with this myself as opposed to
5 just talk about it?

6 A. No, I don't feel differently because
7 in just talking about things I am not the type
8 person that will go out on these little, you
9 know, community discussions that everybody gets
10 on one bandwagon or another, that sort of
11 thing. I have never been a bandwagon sort of
12 person. And I attribute that probably to the
13 way I grew up. As a migrant farm worker, I was
14 a person that wasn't very well thought of as a
15 migrant farm worker, and then I became a lawyer
16 and so forth, and all of a sudden I was Mr.
17 Cool, you see. And, so, I know that facts and
18 circumstances make a difference, and I have not
19 changed my view, because I have had the same
20 view for quite awhile.

21 Q. I noticed you have got a family. You
22 have got -- your son in L.A., what type of law
23 does he practice? That is Patrick?

24 A. That's Patrick. I don't know for sure
25 except I know it will have to do probably with

1 anti-trust and corporate litigation sort of
2 practice that he himself personally is doing as
3 probably two or three other lawyers mold at this
4 point. He has only been out of law school for a
5 little over a year.

6 Q. Your daughter Teresa is at the
7 University of Maryland?

8 A. Yes. She's my career student. She's
9 twenty-nine years old.

10 Q. I know the feeling.

11 A. She just graduated with a major in
12 English with a minor in history.

13 Q. Did I hear you say that Heather in
14 Belmont University, that she is a musician
15 studying music?

16 A. Yes. Her name is Heather Edwards.
17 It's not Heather Harvill. She's my
18 stepdaughter. But as far as she and I are
19 concerned, she's my daughter, and she's studying
20 music business.

21 Q. Music business?

22 A. Yes. And that school is known at
23 least in that area for music business. It used
24 to be called Belmont Baptist. It's now Belmont
25 University.

1 Q. Given the size of your family, both
2 children and stepchildren, did you manage to get
3 through, so far, at least, without having any
4 difficulty with any of your children having
5 problems with the law?

6 A. I have been extremely fortunate. I
7 feel that my children are better than me because
8 they have never had the least bit of trouble
9 with the law of any kind.

10 Q. That is amazing today for a parent to
11 be able to say that.

12 Do you know whether your wife or your
13 children, any of your family members, hold
14 different views about the death penalty from
15 yours?

16 A. If any of them do, they have never
17 told me, because we generally, for instance, the
18 children, I never have discussed it with them.
19 I don't know how they would feel about it. I
20 know my wife would feel about it the same way I
21 feel about it basically.

22 Q. My concern as a rule is to always know
23 whether there are people who are close to you,
24 people who matter to you who would disapprove if
25 you were on a jury that gave a death penalty

1 verdict.

2 A. I don't know of any. If there are
3 any, I don't know it, okay.

4 Q. Would you feel any pressure in that
5 regard?

6 A. Absolutely not.

7 Q. The insulation is there for the jury
8 and for the judge. One of our previous jurors
9 we talked to about it commented that he saw it
10 more as insulation for the judge as opposed to
11 insulation for the jury, which is interesting.
12 I had never thought of it that way. But,
13 obviously, the twelve jurors are going to know
14 very clearly what the result of their answers to
15 those two questions are. So if someone is
16 inclined to try to manipulate their answers to
17 avoid the death penalty or to be sure it was
18 imposed, it's a very simple thing to do. Do you
19 feel like you would be predisposed to try to get
20 the result you want going in even without
21 hearing evidence? Would you be a person who
22 would want to avoid the death penalty?

23 A. No. In fact, I was impressed
24 favorably by the way that charge and the fact
25 that jurors do know what is going on because I

1 lived for many, many years on the civil side
2 with the jury kind of blindfolded about the
3 results of their answers to issues and that sort
4 of thing; so I was favorably impressed by the
5 way that scheme is set up and the fact that we
6 as potential jurors don't have blindfolds.

7 Q. I want to be sure I am not just
8 hearing what I want to hear, so I will ask you
9 again -- I think sometimes we fall into that
10 trap. I think I am hearing you say that if you
11 are on the jury and you thought the evidence
12 indicated that the answers to those questions
13 should be answered in such a way that the death
14 penalty would result that you could actually do
15 that.

16 A. I have no doubt that I could.

17 Q. At the same time, I am not getting the
18 impression that you are a person who would
19 always answer those questions one way or the
20 other.

21 A. That is absolutely true. I would not
22 go into it with any agenda whatsoever because I
23 feel it's too important for prejudice.

24 Q. You in your law practice, you were
25 primarily a litigator?

1 A. Correct.

2 Q. I feel like it's pretty safe to assume
3 you have had a lot of dealings with using expert
4 witnesses?

5 A. Yes.

6 Q. I have no idea what evidence there
7 might be from the defense. Over here on this
8 side of the street, on the criminal side,
9 discovery is not a two-way street like it is in
10 the civil cases. The defense has a right to
11 discovery from me, but I have no right to know
12 anything about what they might do. I can only
13 assume, given the type of case, that it would
14 not be at all unusual for us to hear experts in
15 this type of case, psychologists,
16 psychiatrists. Having relied on expert
17 testimony in your professional experience, I am
18 concerned to know what your attitude is toward
19 that field, especially of psychology. Do you
20 feel like that is a precise enough science that
21 you would feel like you really should always
22 rely on that type of testimony?

23 A. Not always; I wouldn't say always
24 rely; but I personally have relied on it in some
25 of my cases; and, yes, I do believe in the field

1 of psychology; and I do believe that it can be
2 helpful. It's like anything else, you have to
3 judge what you hear and what you see and whether
4 or not it rings true; but I am not one that
5 bashes psychologists or is in love with
6 psychologists. I am simply objective in my
7 attitude. In other words, my mind and heart
8 position is to be objective about that sort of
9 thing without prejudging it.

10 Q. When we are talking about that type of
11 thing, people's information about how someone
12 might conduct themselves in the future, do you
13 feel like just laymen opinion can also be
14 valuable?

15 A. Absolutely.

16 Q. Perhaps, is there ever a chance that
17 that might weigh heavier with you in some cases
18 than a psychologist, given the circumstances?

19 A. Given set of circumstances, possible
20 that I might feel better about some lay
21 testimony than I would about a psychologist in a
22 given situation. On the other hand, it could be
23 the other way, too. I have seen it both ways in
24 civil cases.

25 Q. In some instances, I can ask or might

1 ask for the death penalty based just on the
2 evidence of the capital murder offense itself.
3 In other words, there certainly is a possibility
4 of your getting additional evidence at the
5 punishment stage about the defendant's
6 background, but in some cases there is no
7 additional, there may be no past criminal
8 history, and maybe there is no psychiatric or
9 other testimony, you just would be looking at
10 the crime itself. Can you see in your mind any
11 situation where that alone could suffice to
12 convince you that those questions should be
13 answered--?

14 MR. STAFFORD: My only qualification
15 to that if he was convinced beyond a reasonable
16 doubt.

17 THE COURT: Would you rephrase it,
18 please?

19 BY MS. DAVIES:

20 Q. Perhaps I left that phrase out. Can
21 you see there ever being a situation where just
22 the crime itself, if you were convinced beyond a
23 reasonable doubt that the issue should be
24 answered in such a way that it resulted in the
25 death penalty, can you see evidence of the crime

1 itself being enough?

2 A. If under the court's instructions if
3 it were appropriate to do so, I can see there
4 are situations that I would think those facts
5 alone would be strong enough that would be
6 favorable to the death penalty. If it would be
7 appropriate for a jury to do so and the facts
8 were horrible enough, yes, I could do that.

9 Q. You said Judge Price presided over the
10 burglary case you were on the jury. Do you
11 remember who the prosecutor was or the defense
12 attorney, by any chance?

13 A. I do not. I know some of them when I
14 see them other than Price, but I don't recall
15 the names. One of the two defense counsel was a
16 big, old guy, great big guy. Name is on the tip
17 of my tongue but I can not call it down.

18 Q. I was concerned -- I know that you
19 heard some of the comments yesterday by one of
20 the members of the venire about having been on
21 jury duty and being offended by the appearance
22 the State was hiding evidence, things that were
23 developed by the defense. I didn't like the way
24 that sounded. I don't like for anybody to come
25 away from a trial feeling that way, but I am

1 wondering what your impression was when you went
2 through that process.

3 A. I understand your concern by those
4 comments because, you know, in every civil case
5 you always have a concern that somebody is going
6 to think that you are trying to hide something,
7 and that doesn't play well with the jury, but my
8 only personal experience in the criminal case
9 was a very favorable one as far as the way both
10 sides conducted themselves and, indeed, the way
11 the court who had ruled against me conducted
12 himself. I thought he did good.

13 Q. I guess that speaks very well. You
14 don't have any built-in concerns in that regard
15 then?

16 A. No, because also I understand there
17 are tactics going on, and I have used the same
18 tactics, so I know what you are talking about.
19 And I know how it plays both ways for each side,
20 you see.

21 Q. Again, you know, everything is not a
22 two-way street over here. After I went home
23 last night I thought, you know, I didn't explain
24 to that person if I leave out part of the
25 statement the defense has the right to put the

1 balance in, but if the defense doesn't want
2 something in and the court rules with them I
3 don't have the reciprocal right to offer in the
4 balance. That is why I wanted to delve into
5 that a little more and see how you felt about
6 that.

7 A. Yes.

8 Q. We deal with -- the burden is always
9 on me. I know you understand that. The
10 standard of proof is beyond a reasonable doubt.

11 A. Yes.

12 Q. Lengthy instruction will be given to
13 the jury on that. It's a high standard. I
14 would not suggest otherwise.

15 A. Right.

16 Q. However, the instruction the judge
17 gives makes very clear that it's not beyond all
18 doubt. We are talking about the death penalty.
19 And some people, frankly, come in here and they
20 tell me when it's the death penalty I have to
21 have all doubt removed. Do you have any
22 feelings along that line?

23 A. I really don't. I think that the
24 Court's Charge tells us what standard to go by,
25 and I don't have any doubt that I can go by that

1 standard.

2 Q. Let's talk about these two issues. In
3 our two stage trial, obviously, we don't even
4 deal with those until we get to the second
5 stage, the punishment stage. And if you are on
6 a jury that was dealing with those you would
7 have already found someone guilty of capital
8 murder, in a case such as this, the murder of
9 two people. The intentional murder. Let me
10 back up a second because I do want to talk about
11 intentional a little bit. I think I touched on
12 this yesterday. My suggestion that the intent
13 to kill can be formed very quickly. Does it
14 seem less serious to you, less egregious if
15 someone kills intentionally but somewhat
16 spontaneously as opposed to someone who planned
17 the murder ahead of time?

18 A. Just on the face of it, without other
19 facts and circumstances involved and so forth,
20 no, I don't think that I would distinguish --
21 there could be, I can see where there could be
22 distinctions, but with that statement alone, I
23 don't see any distinction.

24 Q. Do you have any disagreement with that
25 notion that one can act intentionally but form

1 that intent very quickly?

2 A. Not at all.

3 Q. And as I say, you would have found one
4 guilty, a defendant guilty of intentionally
5 killing two people, guilty of capital murder,
6 before you get to these two issues. In that
7 first issue, let's focus on that for a moment,
8 to answer it yes, and twelve people would have
9 to agree, the twelve jurors would have to agree
10 to answer it yes, you would have to be convinced
11 beyond a reasonable doubt that there is a
12 probability, not a certainty but a probability
13 that the defendant would commit criminal acts of
14 violence that would constitute a continuing
15 threat to society. It's crystal ball gazing
16 some people would say, predicting the future,
17 not to a certainty but to a probability. Do you
18 feel like you could take evidence and ever be
19 able to answer that question yes?

20 A. I certainly feel like I could answer
21 it yes under the right fact situation.

22 Q. What kinds of things would you want to
23 hear about to help you to answer that?

24 A. Well, do you want me to just start
25 talking?

1 Q. Yeah. What do you think would help
2 you?

3 A. I think that the background of the
4 particular individual, other acts of violence,
5 his mental makeup, his psychology, his
6 proclivity being convicted for criminal acts,
7 that sort of thing. In other words, if he had a
8 lifestyle over a period of time, I would say a
9 substantial period of time that showed that he
10 had done dastardly deeds, so to speak, that
11 would be important to me as to what the future
12 might hold for that person.

13 Q. Would a pattern, so to speak, of maybe
14 escalating seriousness be significant?

15 A. Could be significant, yes.

16 Q. And in some instances, again, there
17 may be that would not have the benefit of all,
18 that just the crime itself.

19 A. That's right.

20 Q. Do you feel like that could be enough?

21 A. A particular crime could be enough, yes.

22 Q. It talks about committing criminal
23 acts of violence. To your way of thinking,
24 would you have to be convinced that this person
25 was going to kill again, or are there other

1 criminal acts that you would consider sufficient
2 to be a continuing threat to society?

3 A. Based on that charge, it would not
4 require -- wouldn't require a killing, the way I
5 read that charge. It speaks in terms of
6 criminal acts of violence. So there are acts
7 of violence that are not murder, are not
8 killing; and, so, I would feel that those would,
9 you know, they would count.

10 Q. For some people, even criminal acts
11 such as robbery or burglary, because they have
12 such potential for violence, that that would be
13 the kind of thing that would also be a threat to
14 society that would fit that question.

15 A. I would not exclude it in my mind at
16 all.

17 Q. Basically the way I understand the
18 charge and read those questions, you are going
19 to look at all the evidence. By the time you
20 get to considering those questions, you have got
21 the evidence from the guilt stage surrounding
22 the offense, and if additional evidence
23 concerning background, any personal data,
24 character of the defendant, and you are going to
25 look at all of it in considering each of those

1 questions. Assuming that you are on a jury
2 where twelve people have agreed that, yes, this
3 person is a continuing threat to society and
4 issue number one is answered yes, you are one
5 step closer to the death penalty. You look at
6 issue number two. Basically, to paraphrase
7 rather liberally, it's telling you: Okay, look
8 at it again now, be sure that you didn't
9 overlook any mitigating information that was
10 there, weigh it, weigh what mitigating evidence
11 may be there against the fact of continuing
12 threat to society and decide whether you think
13 he should get a life sentence instead of the
14 death sentence.

15 A. Yes.

16 Q. Like I say, that may be a rather
17 liberal interpretation, but basically I think
18 that is what it comes down to. There may be
19 mitigating evidence; there may be information,
20 from whatever source; but in some instances I
21 would suggest you could weigh that, and it's not
22 enough, it's not enough to offset the danger to
23 society, and the acts that this person did, and
24 that the jury should answer that question no,
25 the result being that, yes, the death penalty is

1 appropriate despite some mitigating evidence.
2 Can you see that that would be a real possibility?

3 A. That could be, yes, I think so. Under
4 that charge, I sure do.

5 Q. I know under the charge, and certainly
6 you are schooled in following the court's
7 instructions; but, you know, I am more concerned
8 with the citizen as opposed to the lawyer as to
9 what your feeling is.

10 A. My personal feeling is that, yes, in a
11 circumstance there can be mitigating
12 circumstances that do not relieve the dastardly
13 deed, so to speak, and the proclivity for doing
14 dastardly deeds. And, on the other hand, there
15 are some mitigating circumstances that I think
16 would potentially call for a different answer to
17 that question.

18 Q. I know that the judge will make clear
19 to the jury that the burden is always on the
20 State. And I think sometimes we assume that
21 mitigating evidence is going to come from the
22 defense. That is not always the case. They
23 have no burden to produce any evidence. There
24 is always that possibility that evidence that is
25 potentially mitigating, just, you know, it goes

1 back to this we don't hide anything. Youth.
2 Some people would consider if you have got a
3 particularly young defendant, well, he is
4 sitting here, would be sitting before the jury,
5 and his age would be obvious, and the State
6 during the presentation of their case might very
7 well just, you know, some facts, the witness
8 could testify about the way the person, the
9 defendant spoke and handled himself to where it
10 might be apparent that he was mentally retarded
11 or young or whatever.

12 A. Uh-huh.

13 Q. So sometimes that mitigating evidence
14 comes from an unexpected source.

15 A. Right.

16 Q. And you would weigh that in.

17 A. Yes.

18 Q. I guess the reason I mention that is
19 to be sure--

20 A. If it's evidence from the case, it
21 could be counted for any purpose, I assume.

22 Q. Right. You weigh it?

23 A. Right.

24 Q. In accordance with those issues and
25 the instructions.

1 Do you have any questions of me?

2 A. No, ma'am, I don't.

3 MS. DAVIES: Thank you.

4 A. Thank you, ma'am.

5 EXAMINATION BY THE DEFENSE

6 BY MR. STAFFORD:

7 Q. Sir, I am James Stafford, again.

8 A. Yes, sir.

9 Q. I don't mean to try to make you feel
10 like I am auditioning you for your job, but I
11 feel somewhat inadequate to talk to you because
12 I know of your reputation and your firm's
13 reputation. I haven't been a lawyer as long as
14 you have, but I feel like it's kind of like a
15 baby surgeon talking to DeBakey or something,
16 feel like what can I say to you because I feel
17 like you know everything.

18 A. Well, I hate to burst that bubble.

19 Q. I am flattered to have a distinguished
20 lawyer to share some ideas. And I think you
21 gathered from me yesterday, and I assume you had
22 the same experience when you were on voir dire,
23 you like jurors to be honest with you.

24 A. Absolutely.

25 Q. I hope I can be equally honest with

1 you. We had one juror come up yesterday and I
2 made a slip of the tongue by saying when the
3 prospective juror ten spoke out about something
4 happened in the jury room we didn't want him to
5 blurt out because we didn't know what he was
6 going to say. My comment was I didn't want him
7 to prejudice the rest of the jury. He came up
8 and said, "You called me prejudiced." "No, I
9 didn't. Time out."

10 A. You always love to hear those things.

11 Q. And, unfortunately, our law is
12 written, talk about prejudices and biases, and
13 of course, as we know, as lawyers what we are
14 really talking about is likes and dislikes
15 because basically likes and dislikes are
16 prejudices and biases, just a matter of what
17 label you put on them.

18 A. I agree.

19 Q. And I think probably -- how many
20 juries do you think you selected through your
21 career?

22 A. I don't know. I used to go to
23 Brazoria County and pick one in the morning and
24 Fort Bend County and pick one in the afternoon
25 and try to have somebody bring my files so I

1 " could look at them later. So.

2 Q. Sounds like an assistant D.A. One of
3 my favorite jokes about the old days was the
4 D. A.'s had so many files they would put the
5 witnesses on the stand without talking to them.
6 Beautiful thing about being a prosecutor, you
7 can say what happened next and develop your
8 case. And sometime they would go, "You are
9 kidding me!"

10 A. I have had a number. For about, I
11 would say, probably, well, actually I started
12 slowing it down in 1988. And from '64 until
13 '88 I had quite an active jury picking season.

14 Q. You will agree with me that probably
15 one of the things we lawyers do -- we may be too
16 guilty of, we stereotype people, and for some
17 reason we go by the bottom of our britches. I
18 am going to be guilty and be candid with you. I
19 am stereotyping you also.

20 A. Sure.

21 Q. Because mostly plaintiffs lawyers are
22 State's jurors, by and large.

23 A. That is news to me. But whatever.

24 Q. That is what I want to talk to you
25 about. If I called Crown or Mr. Kronzer -- and

1 I used to spend a lot of time with Mr. Kronzer
2 and loved to sit and listen to him talk, and he
3 used to share with me stories about when he was
4 a young lawyer practicing criminal law how he
5 had to give it up because it was just eating him
6 alive to do capital cases.

7 A. Did he claim to have ever tried a
8 case?

9 Q. But I wonder if I went to the Crown
10 today and said what could you tell me about Mr.
11 Harvill, what do you think he would tell me
12 about you?

13 A. I don't have the faintest idea. I
14 really don't. You know, we have our thoughts,
15 and I think that he would probably tell you that
16 I am too much for Montague County or something
17 like that, too country, you know. No, I
18 suspect that he would be favorable. I mean,
19 the truth is I think he would give you a
20 favorable picture for either side. I think he
21 would. Because he has not ever heard anything
22 from me that would cause him not to.

23 Q. Okay. Let me explore another area of
24 concern. The reason is we had some jurors that
25 have told us this. There are -- and I put

1 myself in the same category as you. You made a
2 comment I believe it was that when you were
3 talking to Ms. Davies, that you came from a
4 troubled childhood. You probably came from a
5 poor family.

6 A. It wasn't as troubled as it was poor.

7 Q. Yeah. I came from a poor family. And
8 you have made it. You have somehow had the,
9 whether it's the strong hand of your mom or
10 religion, something has helped you get where you
11 are. So you can -- and there is a lot of us who
12 have made it who said I have come from a bad
13 background, but then, once some jurors, when
14 they start judging someone who had maybe the
15 same opportunity but they took a different path
16 for some reason, they may have had a troubled
17 childhood through being adopted, because of the
18 dark hole there, or suppressive parents or
19 something that they didn't have the ability to
20 pull themselves up by the boot straps and make
21 something of themselves. So those type of
22 jurors often, who have risen above the cream,
23 are harder on those folks because they judge I
24 am sure just like your mom and dad and I have
25 heard the story, too, I walked four miles in the

1 snow and I had a bucket with my sandwich in it
2 and you want a ride to school?

3 A. Yeah, my kids' eyes glaze over.

4 Q. Everytime they hear that story?

5 A. Yeah. I think I understand where you
6 are coming from.

7 Q. Do you think you would be harder on a
8 prospective defendant who--

9 A. No, I don't think that I would be.
10 And I say that because somebody that grew up
11 like I did, from like age twelve I was
12 essentially on my own, migrating around West
13 Texas, pulling cotton, associating with all
14 sorts of people. A person with that sort of
15 background tends to either harden the views, for
16 instance, in the area of race because I had a
17 lot of folks that I pulled cotton with who were
18 of a different race than I was. And people tend
19 to go one of two ways. They either harden their
20 views or they develop a situation where they
21 say, well, I am now not a migrant farm worker so
22 I either lambast migrant farm workers or I have
23 a point of connection with migrant farm
24 workers. And my attitude has always been that
25 not to forget where I came from. And, so, you

1 know.

2 Q. I appreciate that.

3 A. I don't have -- I don't think that
4 anybody that came from that has the privilege of
5 doing something that somebody that didn't come
6 from that has that privilege to do. But on the
7 other hand, I don't think because I am not now a
8 migrant farm worker I should look down my snoot
9 at migrant farm workers, basically. That is my
10 attitude.

11 Q. As a trial lawyer, if I may, listening
12 to you talk about capital murder cases, anybody
13 found guilty of capital murder, using your
14 terminology, basically has done a dastardly
15 deed. That is a horrible crime.

16 A. That is true. They have done one,
17 anyway.

18 Q. Just the fact of that. But then,
19 maybe this is a poor analogy, but I guess it's
20 like any type of personal injury suit. You can
21 have a case where liability is not at issue,
22 it's just a matter of whether it's worth a
23 million dollars or whether it's worth five
24 thousand dollars. It's still personal injury,
25 still could be a bad injury, just putting a

1 dollar amount on it. My analogy I guess is the
2 fact that do you feel just because somebody is
3 found guilty of capital murder that he
4 automatically deserves to die because he has
5 been found guilty of a dastardly deed?

6 A. No, I don't automatically, no way.

7 Q. Do you think there are certain
8 situations, factors, justify life in prison,
9 depending on each individual case?

10 A. Yes, I think there are certain
11 situations that would mean that there should be
12 life rather than death.

13 Q. Theoretically mitigation, to me, if
14 you can transfer it on the civil side, is almost
15 like damages. The more damages you have, the
16 more likely you are going to get the death
17 penalty. The lesser damages or the more
18 mitigation you have, basically lessens the
19 punishment. So it's not much difference in a
20 way except naturally, unfortunately, our present
21 state law, which I filed a motion to attack the
22 constitutionality of on special issue number
23 two, the judge ain't going to tell you the
24 burden of proof is on the State to prove to you
25 beyond a reasonable doubt that that question

1 should be answered no. I think it should be
2 that way. To convince you to take someone's
3 life, you should be convinced beyond a
4 reasonable doubt. But you are not going to get
5 that instruction. They are just going to say
6 basically if you think it should be answered
7 yes, which means life imprisonment, you can. If
8 you think he has nice blue eyes or blonde hair.
9 They don't tell you what mitigation is. It's
10 totally up to you. We have had some jurors say
11 I could consider it but I would never give it
12 any effect. There are certain things as far as,
13 once I found. I am probably playing
14 intellectual game with you, but basically in
15 answering issue number one you have weighed all
16 the mitigation factors and basically not given
17 them any justifiable weight, especially if you
18 answer yes, that he will be a continuing threat
19 to society. Then you have to re-examine it as
20 to issue number two. So I am wondering
21 intellectually how, if you have rejected it as
22 to issue number one, how could you give it any
23 meaningful weight and answer question number two
24 in such a way that life imprisonment would be
25 imposed? Do you think it would be difficult, or

1 do you think it's possible?

2 A. Well, let me say this. I would
3 hate -- from my experience, I always hate a
4 closed mind juror. You know, that is something
5 we don't like to see. And the end result is I
6 can see where there can be both a yes on issue
7 number one and yes on issue number two. I can
8 see that. But, you know, I don't know how long
9 it would take me to explain it to you.

10 Q. Well, in your past years of
11 experience, have you found that jurors often
12 disregard the jury instructions and go back, and
13 you just go how in the world did they come up
14 with that decision, or do you think they
15 normally follow the court's instruction? What
16 is your gut reaction?

17 A. Okay. Back to my favorable
18 attitude. In the twenty-five years that I did
19 heavy civil trial work I would say that there
20 were very, very few, maybe two or three at the
21 most -- and I count that being really the fault
22 of me as the lawyer that I lost early cases,
23 but, you know, like first two or three years of
24 practice, but generally I think jurors do what
25 is right. And I know from my past experience

1 with a jury that they do take their job
2 seriously, and they do try to do a good job.
3 Now, what happens sometimes is that jurors hear
4 what the judge says but they don't -- it doesn't
5 soak in to the point where they want to get off
6 base sometimes like here yesterday I had two or
7 three people try to talk to me about things the
8 judge said don't talk about. And, so, I just
9 don't talk, you know. But it doesn't really
10 soak in to them sometimes not to do that. And,
11 so, I just have to walk away or, else, just
12 stand there and say nothing.

13 Q. If you are on this jury, more likely
14 than not you are going to be the foreman, I
15 would gather. And, also, with your twenty-five
16 years persuasion and intellect, you are
17 probably, once you are back in that jury room,
18 the jurors are going to look to you for a lot of
19 guidance.

20 A. Let me say on the other jury, we went
21 back there and they wanted me to be the foreman
22 and I refused to be the foreman because I didn't
23 think that would be right basically because I
24 wasn't there to be some kind of a power broker
25 or because I had had legal education to control

1 things as such. Now, for whatever good that is
2 to either one of you, the bottom line is I
3 wouldn't count on that.

4 Q. I am not asking this question to
5 insult you. If you get mad at me, don't hold it
6 against my guy.

7 A. No, I am very hard to insult.

8 Q. But my fear is, because I don't know
9 you that well, but my feeling about -- I was
10 talking to Racehorse Haynes the other day, we
11 trial lawyers, including Ms. Davies and you, we
12 are rare species.

13 A. We think.

14 Q. I know that. But we have egos.

15 A. Yes, indeed we do.

16 Q. We are kind of prima donnas. We are
17 kind of like the surgeons. We are prima
18 donnas, or I don't think we would be trial
19 lawyers. There is something about we love or
20 something that feeds us, but we are that way. I
21 am not trying to commit you. If you are back in
22 the jury room and for some reason you honestly
23 feel in your heart and your soul that the death
24 penalty is just in this case and you should
25 answer those questions one and two in such a way

1 that the death penalty would be imposed, but the
2 ten other jurors, eleven other jurors believe
3 one of the questions should be answered in such
4 a way life imprisonment should be imposed, do
5 you think that you would be offended, or do you
6 think you would go forward to try to convince
7 them over to your side in such a way to whip
8 them around as an ego thing? You understand
9 what I am trying to come from?

10 A. Yes.

11 Q. I am sure the State would like to know
12 the same thing, if you felt like life.

13 A. Let me tell you my attitude about it,
14 for whatever it's worth to either one of you.
15 My attitude about it would be what I believed to
16 be right I will defend and I won't give up
17 easy. But, you know, everybody has their own
18 view, and if it came to a situation, it boils
19 down to, I will not be a person that just kind
20 of flies with the wind.

21 Q. I understand that.

22 A. I will be a person if I hold a view
23 back in the jury room, you know, whichever way
24 it is, I am not one that is easy to give that
25 view up.

1 Q. Do you think you are going to be like
2 Gregory Peck in that movie where he convinced
3 all the eleven jurors to whip over to his side?

4 A. Let me tell you a story about that if
5 I might. The last case I tried the foreman of
6 the jury came to me after the trial and
7 mentioned this movie. I have never seen that
8 movie. I don't know what Gregory Peck did or
9 didn't do, but he came to me after that, and he
10 said that jury followed that movie -- it was
11 just like a carbon copy of that movie, and I
12 don't know even know what the movie is about
13 because I have never seen it. I almost refuse
14 to watch legal movies. So, the end result is,
15 if what you are talking about is he brought
16 everybody over to his side, I have heard those
17 ego stories like that, but that is not me. I
18 can't imagine myself letting false pride get to
19 the point where I would want to either acquit,
20 convict or do anything else to another person
21 based upon whether Dale Harvill thought he was a
22 big wheel or not, you see. I don't think I
23 would go that way.

24 Q. Let me ask you this. Criminal cases,
25 again, very similar to the civil cases, I am

1 sure you have tried a lot of civil cases where
2 liability is not at issue, it's really being
3 tried for damages.

4 A. It seemed rare.

5 Q. But occasionally?

6 A. Occasionally.

7 Q. You have those. Often in criminal
8 cases the same way, case is tried for punishment
9 not so much as to guilt and innocence.

10 A. Yes.

11 Q. I need to ask you if for some reason
12 you were on a jury like that and a person pled
13 not guilty where maybe at the conclusion it's
14 obvious he is guilty beyond all sin, would you
15 hold that against him because he didn't plead
16 guilty and fess up to the jury, that there are
17 certain legal things that we have got to do?

18 A. No, I wouldn't. You mean if somebody
19 pleads not guilty would I hold that against
20 him?

21 Q. And make the State prove it when at
22 the conclusion it's substantially overwhelming
23 that he is guilty, for example. May have
24 confession, may have eyewitnesses, but he still
25 has a right to plead not guilty. Some jurors

1 are offended by that.

2 A. I can understand that could be, but it
3 wouldn't be me, either.

4 Q. Okay. And as Ms. Davies said, civil
5 and criminal trials are different. I have often
6 described them on our side as trial by ambush
7 from the standpoint that, true, we may at times
8 get to see her file, but if you ever try to get
9 to go out and talk to the witnesses, like police
10 officers, they don't talk to you until they get
11 on the stand. So often we do not know what
12 they are going to say. And I hope you don't
13 hold it against either side if it looks like we
14 have a look of amazement on our face at times.

15 A. I am really going as a juror to try to
16 look at the facts and not too much at the
17 lawyers, basically because I know we all as
18 lawyers we think that we control things, and we
19 do to a large extent, but I will purposely not
20 be trying to judge the lawyers in this case. I
21 will be trying to judge the facts in the case.

22 Q. Let me tell you one thing. If there
23 is a positive side about trying capital murder
24 cases is that basically everything in the world
25 eventually that is good or bad can come out

1 against an accused. The State can introduce
2 offenses where he has never been charged with
3 them, never been indicted. There is a
4 provision in the law that says anything that is
5 relevant, according to the judge, that goes to
6 the answering of this issue, the adjudicated,
7 unadjudicated, everything including the barnyard
8 if the judge thinks it can come into you.
9 Unlike any other case, they can kind of lay
10 everything in front of you to help you, if it
11 does, to answer these special issues. That is
12 not a question, I guess it's more of a comment
13 to you.

14 But let me ask you one other thing.
15 Through your many years of experience, have you
16 ever known anybody that has adopted any
17 children?

18 A. Yes.

19 Q. Have you ever known anybody that has
20 adopted children say after they already reached
21 say four, five, six, seven years old?

22 A. Yes.

23 Q. In your opinion, what are the
24 formative years for a child, for example, that
25 could possibly affect them as they grow older as

1 to their conduct and their personalities if you
2 had to peg a number?

3 A. I am, you know, really not,
4 technically I would not know exactly what that
5 would be; but, to me, with mine, I felt that all
6 their years were very important, you know, that
7 I was with them as their parent. I thought
8 that was very important from day one
9 basically.

10 Q. If we brought you expert testimony in
11 that regard, I gather from your responses to the
12 State, you can listen to it and give it whatever
13 weight you deemed appropriate?

14 A. Yes, whatever -- I know there are
15 certain things that psychologists and
16 psychiatrists say, but I don't know what they
17 are. So, as a parent I just have to kind of
18 glome over it and say I tried to do my best all
19 the time with them.

20 Q. How important -- I gather from reading
21 your information sheet you are fairly active in
22 the church?

23 A. My wife is more active than I am, but
24 I am active, yes. I am on a faith for the
25 future committee of the church. And I have been

1 a member of that church for about a year and a
2 half. Before that, I was a Methodist. I
3 switched over to the church I am now a member
4 of.

5 Q. Trying to figure out how to word this
6 without -- I guess what I am trying to say are
7 you a teetotaler? Are you totally on one side
8 of the religious spectrum now or kind of look
9 down on people who do not? I am just being
10 blunt to you. If I hurt your feelings, I
11 apologize.

12 A. You are not hurting my feelings. No,
13 unfortunately, I can't live, you know, I
14 personally have not been able to be a
15 teetotaler. And one of the reservations I had
16 in switching was when a long time ago they
17 required a teetotalling oath, you see. And,
18 so, I told my wife, before we switched, I said
19 if they are going to require me to sign that
20 oath, I am not going to do it because I am going
21 to have, you know, I am not going to get out and
22 get drunk, but if I want to have a drink I am
23 going to have it. And if that is a sin, I will
24 ask forgiveness, but I know myself well enough
25 to know that I can't live as a teetotaler.

1 And, in fact, in years past, when I was a
2 downtown lawyer, sometimes I didn't teetotal
3 enough.

4 Q. Especially if you are around
5 (unintelligible).

6 A. I could tell you a few stories about
7 him, but I won't.

8 Q. I could probably share some with you,
9 too. Maybe someday somebody will write a book
10 about him. The publisher would be the problem.

11 A. Probably.

12 Q. The Graham Hill that your wife worked
13 for, was that John Hill's son?

14 A. No, that is Graham Moore.

15 Q. Graham Moore.

16 A. No, Graham Moore was a divorce lawyer
17 around town.

18 Q. How many years ago was that? Do you
19 recall?

20 A. My wife and I have been married now
21 almost fifteen years. And that was before we
22 married. So sixteen or seventeen years ago.
23 Graham died as a young lawyer basically in his,
24 well, mid 30's, and she had just quit when he
25 died. So it was fifteen or sixteen years ago.

1 Q. One last question. If you were the
2 defense lawyer in this case would you put a
3 juror of your thinking, of your nature, knowing
4 that I want to save my client's life on my
5 jury?

6 A. Let me say this to both sides. Here's
7 what I am going to say is I don't want to be on
8 this jury. I just soon not to be, okay. But I
9 will say this to you: If I was being charged, I
10 would want somebody that had my attitude on the
11 jury basically because I might go one way but I
12 might go the other, too. I have no agenda going
13 in. I have no preconceived notions going in.
14 And that is all I can say about it. Maybe both
15 of you will see fit that you don't want me,
16 so.

17 Q. This may sound real pretentious. It
18 seems at times when a juror of intellectuals, as
19 I call them, college educated jurors, often can
20 assess punishment a lot quicker than lay people
21 who are uneducated. What I call the common
22 folks. They get more passionate and more
23 merciful. Sometimes I think we get in ivory
24 towers and it's easy to mete out harsh
25 punishment. That troubles me about you. I am

1 not trying to be cute or funny. Anyway, thank
2 you for your candor.

3 A. You are very welcome.

4 THE COURT: Would you stand outside,
5 please.

6 (The prospective juror leaves the
7 courtroom).

8 MS. DAVIES: The State will accept Mr.
9 Harvill.

10 MR. STAFFORD: Let me visit with
11 counsel and the defendant.

12 (Pause).

13 MR. STAFFORD: I accept the juror,
14 Your Honor.

15 THE COURT: Okay. Ask him to come in,
16 please.

17 THE COURT: Mr. Harvill, come up
18 here. You have been selected to serve on this
19 jury.

20 THE JUROR: You are kidding.

21 THE COURT: If you would first turn to
22 this gentleman, he is going to swear you in.

23 (Juror Sworn)

24 THE COURT: In a minute he is going to
25 go over the information on your sheet there to

1 make sure we have appropriate phone numbers,
2 that kind of thing. We are going to start
3 testimony in this case, unless you get further
4 notice of some change, on Monday, September
5 28th. Ask that you return at ten a.m. On the
6 week of Monday, September 21, we will be calling
7 you. If we haven't called you by Tuesday, give
8 us a call. Both on that slip and on the back of
9 the badge are phone numbers. The attorneys are
10 being instructed not to engage you in
11 conversation. If we run into you, we may nod
12 recognition. If anybody attempts to talk to you
13 about the case, bring it to our attention
14 immediately, give us a call, talk to the bailiff
15 or the process server, me. Our courtroom is up
16 on the eighth floor. That is where we will be
17 trying the case. Same building, eighth floor.
18 We will give you full instructions and give you
19 a call as to the exact time. I am going to
20 anticipate 10:00 a.m. on Monday, September
21 28th. Don't make any kind of independent
22 investigation. Don't attempt to find out
23 exactly which case it is we are going to be
24 trying. Don't go read any law on capital
25 murder in textbooks or that kind of thing, try

1 to figure out what we are doing because the law
2 does change and has changed in this case. In
3 fact, I believe I might have told this panel
4 this is the first case we are trying under the
5 new capital murder statute.

6 THE COURT: Mr. Stafford, do you have
7 any requested admonitions?

8 MR. STAFFORD: No.

9 THE COURT: Ms. Davies.

10 MS. DAVIES: I believe you have
11 covered everything.

12 THE COURT: Do you have any questions
13 of me?

14 THE JUROR: No, sir. I will just try
15 to be here unless I hear otherwise.

16 THE COURT: Wear your badge at all
17 times when you are in and around the
18 courthouse. It identifies you as a juror so we
19 are not talking about cases in front of you.
20
21
22
23
24
25

1 JENNIFER MILSAPS,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT:

5 Q. This is prospective juror number six
6 on panel number two, Ms. Jennifer Milsaps.

7 Let me run over some of the things on
8 your questionnaire. We have to talk over this
9 din that is going on out here. I am not sure
10 what we are missing. You have two very young
11 children. You have a month old child?

12 A. Yes.

13 Q. Are you back at work?

14 A. Yes, I am.

15 Q. How long have you been back at work?

16 A. About three weeks.

17 Q. You weren't out very long; were you?

18 A. No. My daughter was in the hospital
19 for a month after birth, so I had to go back and
20 take maternity leave later.

21 Q. She's only a month old now?

22 A. Yes.

23 Q. When did she get out of the hospital?

24 A. About three weeks ago, also.

25 Q. Your husband is a security officer?

1 A. Yes, he is.

2 Q. How long has he been doing that kind
3 of work?

4 A. About three years.

5 Q. Does he transfer from job site to job
6 site, or he is only at one location?

7 A. Usually he transfers a few months.
8 He has been at this location for a few months
9 now.

10 Q. The other jobs he has had, pizza
11 deliverer, painter and daddy?

12 A. He was a painter for twenty something
13 years, and I made him go and get another job.
14 He worked for his father.

15 Q. He started young, if he is only
16 twenty-six now.

17 A. Yeah, he started very young.

18 Q. Did you meet your husband at Blinn?

19 A. No, I met him through a mutual friend
20 in high school.

21 Q. Pages eight and nine of this
22 questionnaire list statements and have you
23 either check the one which best summarizes your
24 views about capital punishment and the death
25 penalty or ask you to either agree or disagree

1 with the statement. And in an attempt to
2 summarize, you believe capital punishment is
3 basically wrong but necessary for some offenses;
4 is that correct?

5 A. It depends on the person who is on
6 trial. It just depends.

7 Q. At any rate, you said your decision on
8 whether the death penalty should be assessed
9 would depend solely on the facts and
10 circumstances of the individual case; is that
11 true?

12 A. Yes.

13 Q. You had checked that agreed with the
14 statement which said capital punishment should
15 be available as punishment for more crimes than
16 it is now. I know that you filled out this
17 questionnaire before we had the opportunity to
18 talk to you. Were you aware when you came in
19 here yesterday that capital punishment was
20 available for so many different kinds of
21 offenses? I listed about six.

22 A. No, I really didn't know what it was
23 available for.

24 Q. You understand murder is when somebody
25 intentionally and knowingly causes the death of

1 another person. Capital murder is intentional
2 killing plus some kind of aggravating factor.
3 We have in Texas six different ways in which the
4 offense of capital murder can occur, including
5 murder of a peace officer or fireman in the
6 lawful discharge of an official duty, murder for
7 hire, murder for remuneration schemes,
8 committing murder while escaping or attempting
9 to escape from a penal institution, being
10 incarcerated and murdering somebody who is
11 employed by the penal institution. When
12 somebody commits the offense of murder while in
13 the course of committing another felony offense
14 like robbery or burglary, aggravated sexual
15 assault, kidnapping, arson, they kidnap, rape,
16 murder, those cases are capital murder
17 offenses. Robbing a store clerk and killing him
18 in the course of that robbery, that would be
19 capital murder. And then the last category is
20 the one that we are talking about in this case,
21 where somebody murders two or more people in the
22 same criminal transaction. It could be as few
23 as two people up to however many people. The
24 multiple murder situations. Are all those the
25 kinds of offenses that you think should be

1 capital murder offenses?

2 A. --.

3 Q. By capital murder offense I am saying
4 if somebody is convicted of a capital murder
5 offense it's mandatory that the punishment
6 either be life or death. Do you think those
7 different categories that I just listed are what
8 should be capital murder offenses?

9 A. It's a hard question. I believe they
10 should be.

11 Q. Can you think of any others offhand?
12 Have you given much thought to it at all?

13 A. No, I haven't given much thought to
14 anything like that.

15 Q. Have you ever been called for jury
16 service and not taken?

17 A. No, never. This is my first time.

18 Q. First time down here and you get the
19 long form questionnaire?

20 A. Right.

21 Q. We talked about a number of general
22 concepts of law. Presumption of innocence. Any
23 defendant in a criminal case is not a little bit
24 guilty. He is presumed innocent as he sits in
25 court. Do you agree with that?

1 A. Yes.

2 Q. The indictment in a criminal case is
3 no evidence of guilt whatsoever. That can't be
4 considered. Do you agree with that?

5 A. Yes.

6 Q. The burden of proof in a criminal case
7 is always on the State. They have to prove a
8 defendant's guilt beyond a reasonable doubt.
9 Not beyond all doubt, not beyond a shadow of a
10 doubt. Do you agree that should be the burden
11 on the State?

12 A. Yes.

13 Q. If a defendant does not take the stand
14 and testify in his own behalf, I will instruct
15 the jurors that they are not to consider that as
16 any evidence of guilt whatsoever. Would you
17 agree with that?

18 A. Yes.

19 Q. Did you know before you came in here
20 yesterday that if a jury found someone guilty of
21 the offense of capital murder that in the second
22 stage of trial the jury does not go back and
23 vote for life or death; they, instead, answer
24 certain questions I submit to them; and
25 depending on how the jury answers those

1 questions, I assess either life or death? Did
2 you know that is how it worked?

3 A. No.

4 Q. Does it make a little bit of sense,
5 now that we explained to you yesterday, that it
6 worked that way?

7 A. Yes.

8 Q. See how we are insulating the jury in
9 some fashion and the judge in some fashion.
10 It's a two stage trial. The first stage is
11 where you hear all the evidence in the case in
12 chief. I have no idea what kind of evidence you
13 are going to hear in the case because I will
14 hear it for the first time as you do. But after
15 both sides rest and the charge is read to you,
16 you go back and deliberate the issue of guilt.
17 Has the State proven the defendant guilty of
18 capital murder beyond a reasonable doubt. If
19 raised by the evidence, there may be charges on
20 what we refer to as lesser included offenses.
21 When these folks are talking to you about the
22 offense such as voluntary manslaughter,
23 involuntary manslaughter, negligent homicide,
24 those may be in certain cases lesser included
25 offenses of the offense of capital murder. If a

1 jury returns a verdict of guilty of capital
2 murder, there is a second stage of trial.
3 Additional evidence may be presented. The jury
4 may have evidence of a defendant's background,
5 his character, his reputation, other
6 circumstances. They may have evidence of a
7 defendant's previous criminal record. I don't
8 know what all might be included in a given
9 case. But at the close of that second phase,
10 the jury goes back after finding a defendant
11 guilty of capital murder and is asked to answer
12 the questions or special issues that determine
13 whether or not the death penalty is assessed. I
14 am going to refer over here to the board.
15 Issue number one asks you: Do you find from the
16 evidence beyond a reasonable doubt that there is
17 a probability that the defendant would commit
18 criminal acts of violence that would constitute
19 a continuing threat to society. That is asking
20 the jury to make a determination basically of a
21 defendant's future dangerousness. By
22 probability we are asking is it more likely to
23 occur than not that a defendant would commit
24 criminal acts of violence constituting a
25 continuing threat to society. You would be

1 instructed, when you're answering issue number
2 one, that the jury is to consider all the
3 evidence admitted at the guilt or innocence
4 stage of the trial, the first stage of trial and
5 the punishment stage, the second stage of the
6 the trial, including evidence of a defendant's
7 background or character or the circumstances of
8 the offense that militate for or mitigate
9 against the imposition of the death penalty. So
10 you have all this evidence in the record and you
11 look at all of it and you make that
12 determination is there a probability this
13 defendant whom you have already convicted of
14 capital murder would commit criminal acts of
15 violence constituting a continuing threat to
16 society. It takes all twelve jurors to agree
17 that the answer should be yes. It takes ten or
18 more to agree that the answer should be no, a no
19 answer to be returned in open court. If the
20 jury answers no, ten or more people say no, that
21 there is not a probability he is going to commit
22 criminal acts of violence constituting a
23 continuing threat to society, then I assess life
24 in prison. If the jury says yes, there is such
25 a probability, then you move on to issue number

1 two. Issue number two asks whether taking into
2 consideration all the evidence, including the
3 circumstances of the offense, the defendant's
4 character and background and the personal moral
5 culpability of the defendant, there is a
6 sufficient mitigating circumstance or
7 circumstances to warrant that a sentence of life
8 imprisonment rather than a death sentence be
9 imposed. I would instruct the jury that the
10 jury is to consider mitigating evidence to be
11 evidence that a juror might regard as reducing a
12 defendant's moral blameworthiness. So even if
13 the jury decides that there is a probability
14 that defendant on trial would commit criminal
15 acts of violence constituting a continuing
16 threat to society, you then look at everything
17 left, and you ask whether or not there is
18 something here which says a life imprisonment
19 sentence is warranted rather than a death
20 sentence. It takes all twelve jurors agreeing
21 the answer should be no. It takes ten or more
22 to say yes. If the jury says yes there are
23 circumstances here which warrant a sentence of
24 life imprisonment be imposed even though they
25 answered yes to number one also, I will impose a

1 life sentence. If the jury answers no to that
2 question, after having first answered yes to
3 number one, it comes back to me and I assess the
4 death penalty. So the jury doesn't vote for
5 life or death; you answer these two questions;
6 but you know full well if you answer number one
7 yes and number two no I am going to assess the
8 death penalty. Do you understand?

9 A. Yes.

10 Q. When we are talking about mitigating
11 evidence, we are talking about any evidence that
12 is relevant to a defendant's character, his
13 record or circumstances of the offense, anything
14 which might serve as a basis for a sentence less
15 than death. We know it includes such things as
16 mental retardation, mental illness. It could
17 include such things as age. I don't know how
18 long the list might be, what all different kinds
19 of things might be included when that jury
20 starts to looking at mitigating evidence or when
21 mitigating evidence is presented from either
22 side. It may come from either side. We don't
23 depend on either side to bring you mitigating
24 evidence. You can't ask that one side or the
25 other bring it in. It might include a

1 defendant's good behavior while in prison or
2 jail. Might include an exceptionally unhappy
3 childhood, economic deprivation. It could
4 include drug abuse, childhood abuse, age,
5 voluntary intoxication, drug dependency,
6 illiteracy, opinion testimony of lay witnesses
7 or psychiatric opinion testimony that a
8 defendant is not a danger in the future, would
9 not be a danger in the future. It could include
10 all those different things. I don't know what
11 you might receive in any given case. I don't
12 know what you might have before you to
13 consider. But you consider all those things
14 before you when you answer these questions,
15 special issues. I want to make sure that
16 jurors don't automatically answer one way or the
17 other, answer a yes or answer a no so that they
18 are assured either a death penalty would be
19 imposed or a life sentence would be imposed,
20 that they answer these questions honestly,
21 depending on the circumstances you have before
22 you. Do you think you could do that?

23 A. Yes.

24 Q. Is there anything regarding your views
25 on capital punishment and the death penalty

1 which you think would prevent or substantially
2 impair the performance of your duties as a juror
3 in accordance with the instructions you will be
4 given and your oath as a juror?

5 A. No.

6 THE COURT: Ms. Davies.

7
8 EXAMINATION BY THE STATE

9 BY MS. DAVIES:

10 Q. Hello, Ms. Milsaps.

11 A. Hello.

12 Q. I want you to know right up front that
13 there are no right or wrong answers and we are
14 not wanting you to answer to agree with anybody
15 or to answer the way you think we want. We
16 really want to know what you feel, what you
17 believe and what you think about some of these
18 things. Fair enough?

19 A. Fair enough.

20 Q. You haven't taken an oath yet to serve
21 on the jury. Those people who are on the jury
22 will take an oath to follow the law. And, so,
23 this is your chance to tell us how you really
24 feel, whether you can take an oath to follow the
25 law as it exists because we don't want anybody

1 to be in a moral bind and force them to take an
2 oath that they disagree with something.

3 Your baby is a baby girl?

4 A. Yes.

5 Q. What do you call her?

6 A. Elizabeth Renee is my youngest.

7 Q. Are you calling her the whole thing?

8 A. Pretty much.

9 Q. A big name for a little baby, but she
10 will grow into it.

11 A. Yes, she will.

12 Q. How is she doing?

13 A. She's fine. She's gaining weight.

14 Q. You said she was in the hospital for
15 several weeks?

16 A. She was five weeks early.

17 Q. Okay. How old is she now?

18 A. She will be two months on the 14th.

19 Q. I hear other friends talk about how
20 difficult it is to get such a young child into
21 day care.

22 A. She could have gone to the day care as
23 soon as she came out of the hospital. It was no
24 problem with them.

25 Q. That's good.

1 A. She's in day care now.

2 Q. Okay. Well, one reason I wanted to
3 ask that, on the very last page where it asks
4 about things that might affect your service as a
5 juror you mentioned her, and, so, I want to be
6 sure whether health problems, special demands on
7 you.

8 A. If she gets sick, that would be the
9 only reason. If she had to go back to the
10 hospital, I would want to be there with her.

11 Q. You don't have any reason to
12 anticipate that?

13 A. No, nothing.

14 Q. I just wanted to be sure what serious
15 demands might be put on you. Sounds like
16 you're busy, working and two young children.

17 Your husband is a security guard?

18 A. Yes, ma'am.

19 Q. That is a pretty recent change of jobs
20 for him?

21 A. No, it has been about three years. He
22 just got on day shift now.

23 Q. Does he like that?

24 A. Yes, he seems to like it.

25 Q. When he comes home, do you discuss any

1 of the experiences he has in his job?

2 A. He fuels trucks for UPS. There is
3 nothing really exciting there.

4 Q. He hasn't had any exciting stories
5 about criminal offenses?

6 A. No, no, he doesn't do anything like
7 that, no.

8 Q. How did you feel -- you know, it's
9 easy for all of us to talk about whether we
10 believe in the death penalty or don't believe
11 when we are just talking about what we read in
12 the newspaper. Tell me in your own words how
13 you feel about whether the death penalty is
14 necessary and appropriate.

15 A. It's necessary, but you don't know who
16 it's necessary for unless you hear both sides,
17 hear the whole story, you don't know. I
18 couldn't tell you really. It just depends on
19 each situation.

20 Q. Do you hear about certain cases, types
21 of cases that you agree when you read about, oh,
22 this person got the death penalty, you think,
23 yeah, that is right, or disagree and think, oh,
24 no, that shouldn't be?

25 A. I really don't know. Like I said, it

1 depends. I wasn't there to hear both sides of
2 the story. And they may, if they got the death
3 penalty and somebody might say, oh, he deserved
4 it, but I think to myself I don't know that. I
5 don't know if they deserved it.

6 Q. Have you always believed in the death
7 penalty, that it was necessary, or at some point
8 in your life have you had a different opinion?

9 A. I guess I kind of grew into it. I
10 couldn't tell you. It's just something I guess
11 I just kind of grew into. It's necessary, you
12 know, once in awhile. I don't know.

13 Q. How does your husband feel about it?

14 A. I really haven't discussed that with
15 him. He has his own beliefs on issues like
16 that. We kind of don't talk about it because we
17 will end up, I don't want to spoil his views and
18 I don't want him influencing me, end up arguing
19 about it.

20 Q. Okay. Have you ever gotten into an
21 argument or discussion with anybody on the
22 subject of whether the death penalty should be
23 available?

24 A. No, I try to stay away from things
25 like that.

1 Q. Do you have other family here in the
2 Houston area?

3 A. Yes.

4 Q. What?

5 A. My mother and father. My brothers,
6 one of my brothers is near Houston. My
7 in-laws.

8 Q. Do you feel, if you should be on a
9 jury and you were a jury that gave the death
10 penalty, do you feel like anybody in your family
11 or close friends would disapprove of that?

12 A. I really wouldn't care what they
13 thought. I don't care whether they would
14 disapprove or approve. It's just the jurors'
15 choice, and it's really none of their business.

16 Q. I noticed -- well, the judge had asked
17 you this, and I guess I want to try to be sure
18 that I understand your attitude toward what
19 kinds of cases should be capital murder. When
20 we say capital murder, we are talking about
21 where the death penalty is a possibility. You
22 know that this particular case is the murder of
23 more than one person in the same criminal
24 transaction. If you were going to write the law
25 that said, well, death penalty would be

1 available for only certain cases, do you feel
2 like you would include that, killing more than
3 one person?

4 A. Yes. It would be kind of hard to
5 decide. At least, I haven't thought about it
6 except for the past two days about what I would
7 include in it. There is a lot more things I
8 need to consider before I sit down and include
9 all these different crimes.

10 Q. Having thought about it for a couple
11 of days, do you think killing more than one
12 person intentionally is the kind of thing that
13 should be included in that statute?

14 A. It should be.

15 Q. What was your first reaction when you
16 came in for jury duty and at what point did you
17 realize you were going to be questioned
18 regarding a case that might involve the death
19 penalty?

20 A. When I came in this room.

21 Q. Okay. What about when you were going
22 over that questionnaire, what did you think?

23 A. I really didn't know, oh, I wonder if
24 this is a criminal. I just wanted to answer the
25 questions. I didn't know what kind of case. I

1 have never done anything like this before.

2 Q. You figured maybe they do this on
3 every case every time somebody comes down for
4 jury duty?

5 A. I didn't know.

6 Q. What was your gut reaction when you
7 got in here and you realized this case may
8 involve the death penalty?

9 A. I really didn't have a reaction. Just
10 kind of: Okay, how do I deal with this. And
11 stay open-minded if I was picked, to stay as
12 open-minded as I could and view everything and
13 then tell them how I felt about it, what I
14 thought, or if I had to choose the death penalty
15 or if I was asked the question, just to answer
16 them as honestly as I could.

17 Q. We kind of do this purposely. Maybe
18 it isn't quite fair that you are given this
19 questionnaire before you have gotten over here
20 and found out anything so we get your answer,
21 you know, before you have been conditioned in
22 any way by anything that you have heard here. A
23 lot of times I think people wish they would have
24 a chance to go over the questionnaire again
25 after they have thought about it for two days.

1 How do you feel about that? Would you change
2 any of your answers? Would you like to have a
3 chance to look at it again?

4 A. Well, I think I am pretty much doing
5 that today, answering y'all's questions about
6 it.

7 Q. Was there anything that was in your
8 mind before we even started talking, though,
9 that as you thought for a couple of days -- or I
10 guess that just was yesterday -- it seems like a
11 long time ago.

12 A. It does.

13 Q. Overnight as you thought about it, did
14 anything come to your mind?

15 A. Not really. I don't really remember
16 too many of the questions on there. Once I
17 answered them, I filed them away. It's not
18 coming back too much.

19 Q. There was one thing I was going to ask
20 you about and now I can't find the page. I was
21 very interested in this question that I can't
22 find right now. Here it is. One of the things
23 that we had asked you about and you had written
24 an answer about whether you think certain people
25 are more likely to commit crimes. And you had

1 written out an answer talking about that
2 sometimes people from great families commit
3 crimes, but you think a person from a bad
4 background might act out their frustration the
5 wrong way. So it's interesting. You are
6 talking about bad background. What did you
7 have in mind? What were you thinking?

8 A. Okay, physical abuse, sexual abuse,
9 mental, verbal, maybe a very poor background,
10 could be very rich and not, you know, been
11 schooled to death, something like that. A great
12 background to me would be somebody that has a
13 good family, closeness, they may not be rich,
14 may not be poor. That is a good background to
15 me.

16 Q. Okay. So you are thinking it's more
17 likely that a person with a bad background?

18 A. They could. They may not have a way
19 to funnel their frustration. May not have been
20 taught the right way of how to vent their anger.

21 Q. Do you feel like if somebody has come
22 from a bad family background, you mentioned
23 several things there, abuse and deprivation of
24 various types, do you feel like that they would
25 be -- you shouldn't hold them to blame the same

1 way as you would somebody who had a good family
2 background?

3 A. You still have to hold them
4 accountable for what they have done, but you can
5 take it into consideration about what kind of
6 punishment, you know, what to do, how to take
7 care of the situation.

8 Q. Do you feel like someone, if things
9 happen to them when they are very young, that
10 that would mean that they should not be punished
11 the same way as somebody who had a good
12 background?

13 A. It depends on the person. Somebody
14 that may have been abused by men and they may go
15 and hurt every single man they see, they should
16 be punished different than just somebody that
17 didn't have a background like that. I don't
18 know really. It just depends on the person.

19 Q. Okay, I am not sure that I am
20 understanding. I don't want to misread what you
21 are saying here. You said if somebody who was
22 abused, that then they--

23 A. If they go ahead and start being
24 violent to somebody else, no, they should be
25 punished for that; but it just depends on their

1 mental status then and how they feel about it
2 then, you know, as opposed to somebody that did
3 something violent and was not abused.

4 Q. Okay.

5 A. It's hard to.

6 Q. Would it matter how violent their acts
7 were, what kind of things they were doing?
8 Would that make a difference? Or do you feel
9 like their bad background would tend to excuse
10 their blame?

11 A. It wouldn't excuse it, no; it just
12 would depend -- I don't know how to describe
13 it -- it would just depend on the different
14 person, their character and things. They may
15 need more help than somebody who came from a
16 good background and just did it intentionally
17 and meant to hurt the person and they are not
18 sorry about it or something, and they need to be
19 punished. Just depends. They may need some
20 help on that.

21 Q. Do you feel like -- it's so easy for
22 us to sit here and talk in the abstract about
23 whether the death penalty is necessary. If it
24 came right down to it, do you think that you
25 could actually be on a jury that gave a verdict

1 that resulted in the death penalty? Could you
2 actually do that yourself?

3 A. Yes, if it was necessary.

4 Q. I'm sorry?

5 A. If it was necessary, yes.

6 Q. When you say if it was necessary,
7 what?

8 A. Okay.

9 Q. What are you thinking? Just try to
10 tell me. I know it's hard to express. I have
11 a hard time asking the questions. We just
12 really want to know how you feel.

13 A. I mean, if a person is going to do it,
14 they are going to be violent, there is nothing
15 they can do to help them then, yes, they should
16 have the death penalty. But if there is some
17 way to help them, if they are trying to improve
18 their life, and go to the second question and
19 whatever we answer, you know, have a life
20 sentence, then it would be all right. But if
21 they are not going to change or if the
22 circumstances would not be in their favor or
23 benefit to where they need the death penalty,
24 then I would have to answer the questions the
25 way that would be a death penalty. It just

1 depends.

2 Q. Do you feel like you are always going
3 to answer those questions one way or the other?
4 Mind you, you don't get to those questions until
5 after you have found somebody guilty of capital
6 murder, so you know that you are dealing with
7 somebody who has done a capital murder, let's
8 assume, because we know this is the case,
9 intentionally killing two people. So you have
10 already decided they are guilty of that type of
11 violent offense.

12 A. No. I don't -- one more time what was
13 the question?

14 Q. That is what I wanted to be sure. Do
15 you feel like you would always be inclined to
16 answer those questions one way or another?

17 A. Not always.

18 Q. Are you inclined -- are you the kind
19 of person who is, if there was any way to spare
20 somebody's life, in other words, avoid the death
21 penalty, do you feel like that would be your
22 first inclination?

23 A. It's so general, I don't know. You
24 just can't -- I don't know, I would need to hear
25 everything. I don't know what would be my first

1 reaction. I don't know.

2 Q. Let's go back to the first stage of
3 trial. I would have to prove that a defendant
4 had intentionally killed two people, not
5 premeditated. I think there was one question in
6 here about premeditation. I think we have made
7 it pretty clear that premeditation is not
8 required. But I am concerned to know how you
9 feel about that word intentionally. My
10 suggestion is somebody can decide to act
11 intentionally very quickly. How do you feel
12 about that?

13 A. You can, on the spur of the moment you
14 can act intentionally if you do it in anger or
15 even just you can automatically do it right
16 away. Or you can plan and plot and
17 intentionally kill somebody.

18 Q. To your way of thinking, is the murder
19 less serious if it was intentional but
20 spontaneous, something that was done on the spur
21 of the moment as opposed to something that was
22 planned and thought out ahead of time?

23 A. One more time on that.

24 Q. Does it seem less serious to you, a
25 spur of the moment intentional killing being

1 less serious?

2 A. No, they are both serious. It just
3 depends on that person. I really couldn't
4 answer it yes or no.

5 Q. When you get -- a jury first hears
6 evidence in the first stage of trial, first
7 hears evidence on the issue of guilt. That is
8 all you hear evidence about then. And as they
9 consider that evidence, hear the arguments, the
10 instructions from the judge, deliberate, and
11 when I say deliberate, nobody ever contemplates
12 that, you know, quickly reach a decision or just
13 immediately all unanimously agree, the
14 suggestion is that you are suppose to go back
15 there and really sift through the evidence, talk
16 to one another and decide. Once a jury has
17 found somebody guilty, that means they have been
18 convinced beyond a reasonable doubt that the
19 person is guilty. We have thrown that phrase
20 out -- beyond a reasonable doubt, but we haven't
21 really talked about it. There is a long
22 definition. A part of the instruction will make
23 clear that it does not mean beyond all doubt.
24 It's a heavy burden, but it's not beyond all
25 doubt. I want to be sure how you feel. There

1 are a lot of people who feel like capital
2 murder, you are talking about life or death. I
3 would have to have all doubt removed from my
4 mind. How do you feel about that?

5 A. It depends on how much doubt. I
6 mean, if there is a little bit, if you know that
7 person did it. If you believe it and there
8 is -- I don't know how to explain it. You know
9 the person did it. You are sure on that. And
10 you know the person -- are we talking about the
11 first stage or second?

12 Q. The same burden of proof applies at
13 both stages of trial.

14 A. Okay.

15 Q. And, so, that is my concern. Both
16 when you decide somebody is guilty and then when
17 you are deciding what the answers to the
18 questions should be. So basically, in effect,
19 you're determining whether the judge is going to
20 give a life or death sentence. The burden of
21 proof is the same -- beyond a reasonable doubt.
22 Is that enough for you, or would you have to
23 have beyond all doubt?

24 A. Reasonable doubt.

25 Q. I'm sorry?

1 A. A reasonable doubt. I probably would
2 that with just a reasonable doubt. Beyond a
3 reasonable doubt.

4 Q. Okay. Kind of compare it to a jigsaw
5 puzzle. You can have one of these big jigsaw
6 puzzles -- have you ever worked those? They
7 have hundreds and hundreds of pieces. Even
8 though there may be one or two pieces missing,
9 you can see still see the picture. I compare
10 that to reasonable doubt. There could be some
11 doubt but you still see the picture and that
12 would be enough for you. Do you feel?

13 A. Explaining it that way, yes.

14 Q. Let's go talk about those two issues,
15 the second stage of trial. You are considering
16 those after you have found somebody guilty of
17 capital murder. And at that second stage of
18 trial there may or may not be additional
19 evidence. First let's talk about the situation
20 where there is no additional evidence. You may
21 be asked to answer those questions based just on
22 the facts of the crime that you have heard about
23 at the first stage of trial. In other words, I
24 might very well be asking a jury to answer those
25 questions in such a way as to result in the

1 death penalty based just on the facts of the
2 person committing one particular capital
3 murder. Can you see that in some instances that
4 would be enough, that you could be convinced
5 beyond a reasonable doubt that the death penalty
6 should result just based on the facts of that
7 capital murder crime alone? Or would you always
8 have to have more?

9 A. It's hard. Based on both, if that is
10 all the facts I have got and that is all I am
11 going to get, would have to then I would base it
12 on that.

13 Q. Well, and that is all the evidence,
14 and that is the evidence that you would have to
15 use. What I am trying to find out is do you
16 believe that there could be a capital murder
17 offense that was so brutal that that alone would
18 be enough to convince you beyond a reasonable
19 doubt that that first question should be
20 answered yes, that this person is probably going
21 to be a continuing threat to society?

22 A. I don't know. If that is all that I
23 am allowed to work with, then I would have to
24 say yes. It just depends on, you know,
25 everything that was done in the trial.

1 Q. Well, you are saying you have to say
2 yes. You don't have to say yes. You know,
3 that is, I want to know how you feel about it.

4 A. I won't know until I cross that
5 bridge. I mean, it just depends on the person.
6 I don't know what evidence is going to be
7 there. If it's so brutal and all this other
8 stuff, I don't know how I am going to react
9 right then and there. It's different in here
10 than it is over there. I don't know.

11 Q. And that is why all we can do is ask
12 you to look in your heart and your mind and you
13 know yourself and tell us how you feel.

14 Have you heard of any crimes, any
15 capital murders that you think that alone would
16 indicate that somebody deserved the death
17 penalty?

18 A. No, not really. I have never -- even
19 if -- I still didn't know all the evidence. I
20 would want to keep an open mind. If I was
21 there hearing all of it, then maybe that would
22 be my decision, but I don't know.

23 Q. The law says that that would be, that
24 would be sufficient, if the jury is convinced
25 beyond a reasonable doubt. If I brought you

1 evidence of a really brutal capital murder, can
2 you see yourself ever being able to answer that
3 first question yes based on the facts of just
4 one -- when I say just, we are talking about a
5 capital murder.

6 A. Uh-huh.

7 Q. Can you see yourself ever being able
8 to do that?

9 A. I might be able to. I don't know. I
10 don't know. I might. I might not. I am
11 trying to answer as honestly as I can.

12 Q. I understand that. I understand, too,
13 it's like, you know, I might. I am looking for,
14 yes, I can or, no, I can't because that is the
15 kind of thing that both sides are wanting to
16 know, get to know you a little bit better.

17 Look at that first issue and just read
18 it over to yourself so we can focus on that. It
19 talks about probability, not a certainty
20 basically. Some people say that is crystal ball
21 gazing. It's trying to predict the future. And
22 when it comes to how people are going to act,
23 you can't ever do that. What do you think?

24 A. One more time.

25 Q. Do you think you can ever be sure

1 beyond a reasonable doubt what somebody is
2 probably going to do in the future?

3 A. Depends on the person. If the
4 evidence came up to where it would be, yes, a
5 person dah, dah, dah, they are going to do it
6 again, or look at what they did, it might be
7 probable.

8 Q. What kind of things do you think would
9 help you to answer that question?

10 A. I guess character and background, what
11 the crime was about, things like that that might
12 help me more than just examples.

13 Q. Would it make a difference if a person
14 had been convicted of crimes in the past?

15 A. That would weigh on it, yes.

16 Q. Even if they were not violent crimes,
17 if there had been a history of repeated criminal
18 convictions?

19 A. Like what? For example?

20 Q. Auto theft, forgery, burglary, just a
21 pattern of repeated criminal behavior.

22 A. It would weigh some, yes.

23 Q. Do you feel like you would have to be
24 convinced that a person certainly was going to
25 commit criminal acts of violence in the future,

1 or would probably be enough for you?

2 A. Probably would be enough.

3 Q. Where does probably fall for you? Say
4 if a mere possibility was -- if we had a scale
5 of one to ten, mere possibility was a one and an
6 absolute certainty was ten, where would
7 probability fall for you?

8 A. Five or six.

9 Q. For me to persuade you to answer that
10 first question yes, would you have to be
11 convinced that a person was going to kill again,
12 or would other criminal acts of violence be
13 enough for you to consider them continuing to be
14 a threat to society?

15 A. I wouldn't know. Probably threatening
16 society, burglary and things like that, that is
17 serious.

18 Q. I'm sorry?

19 A. Burglary and things like that are
20 serious, but the killing is a lot more serious.
21 I wouldn't know how to, what I would react to
22 that or how I would answer that.

23 Q. Could you answer that question yes if
24 you were convinced by the evidence?

25 A. If I was convinced, yes, I could

1 answer it yes.

2 Q. Even though you knew that that is one
3 step on the way to the death penalty being
4 imposed?

5 A. Yes.

6 Q. Talking about issue number two. By
7 the time you get to that you have decided
8 somebody is guilty of capital murder and you
9 have decided that, yes, they are a threat to
10 society in the future. And basically this tells
11 you to look at all the evidence again and decide
12 whether you think a life sentence should be
13 imposed instead of the death penalty. If there
14 was any mitigating evidence at all, in other
15 words, and you mentioned a couple of things
16 earlier, bad childhood, bad background, can you
17 see yourself ever answering that question no
18 despite some mitigating evidence? And no would
19 mean that there should be the death penalty.
20 Can you see yourself ever doing that?

21 A. Yeah, I could see myself. It's
22 hard. I don't know. But I could -- I don't
23 know how to explain it. It just depends on --
24 I don't know if I could do it if that was the
25 way I felt.

1 Q. I guess, you know, when the jury goes
2 back there, they know what the result of their
3 answers are going to be. So, obviously, you
4 know it's like it's easy for them to manipulate
5 and get the results they want. Do you feel like
6 that there is a result that you would want to
7 reach if you were on a jury? Would you be
8 wanting to avoid the death penalty for
9 somebody?

10 A. Not unless I feel that that is the
11 best for them. I really wouldn't know how the
12 other jurors would feel. I would just tell them
13 my answer and let them see my point of view and
14 then I would look at their point of view.

15 Q. Okay, fair enough. I guess my concern
16 is to know that anybody who is on that jury is
17 capable of answering those questions in such a
18 way that is going to result in the death penalty
19 if that is what the evidence called for. And
20 some people come in here and they tell us I know
21 I couldn't do that or I feel so shaky about it I
22 don't think I could live with myself if I did.
23 Do you think you would have any trouble sleeping
24 at night if you did?

25 A. No.

1 Q. If you in that second stage of trial,
2 on that second issue, I know from not from this
3 case because I have no idea what the evidence
4 would be in this case, but I know from past
5 experience it would not be unusual at all for
6 there to be psychiatrists or psychologists to
7 testify, come in and give their opinion about
8 whether this person is going to be dangerous or
9 their opinion about why they act the way they
10 do. Have you had any exposure to that field,
11 know people who are psychologists or
12 psychiatrists?

13 A. No.

14 Q. What is your impression, do you feel
15 like that that kind of expert would be somebody
16 really important to listen to, that their
17 opinion?

18 A. It's going to be important in
19 determining, it's going to be just like you
20 said, another part of the puzzle in
21 determining. It's just another view.

22 Q. Okay. When we are talking about that
23 kind of thing, they are talking about their
24 opinion about human behavior, do you think they
25 are always going to be right?

1 A. Nobody is ever right, I mean, not all
2 the time. It just -- I don't know -- I guess
3 credibility. I don't know how if they would be
4 right on other times. I don't think they would
5 be right all the time.

6 Q. That kind of information, do you think
7 sometimes just common sense, a lay person and
8 good common sense would be as helpful in
9 answering those questions as psychiatrists or
10 psychologists would be?

11 A. You are asking me about a lay person,
12 if they can answer the question as well as the
13 psychologist?

14 Q. Yeah, just common sense.

15 A. I believe they could.

16 Q. Like the people on the jury, their
17 common sense. If they came up with a different
18 opinion than the psychiatrist, do you think that
19 is possible?

20 A. Might be.

21 Q. Are there things that we have talked
22 about either yesterday or today that you have
23 any questions about?

24 A. Not really.

25 Q. Thank you.

1 MS. DAVIES: Pass the juror.

2

3

EXAMINATION BY THE DEFENSE

4

BY MS. KAISER:

5

6

7

8

Q. Good afternoon. How are you? Not to harp on your daughter and her age or her health, but I want to be clear in my mind. You say your husband is now working day shift?

9

A. Right.

10

11

12

13

14

Q. And, so, if for some reason we got into a trial and we either ended up having to stay here late or when the jury was deliberating you weren't able to go home, would there be someone there to take care of your daughter?

15

16

17

18

19

A. My husband would just take her over to the sister's house. That is what he does. He will stay there with them and take care of the older while they take care of the younger. He switches roles with both children.

20

21

Q. If you had a little bit of advance notice?

22

23

A. No. At my work once a year I have to do that for two weeks, work over night.

24

25

Q. I see. Right now her health is such that you don't anticipate problems? Of course,

1 you never know."

2 A. No.

3 Q. But she's gaining weight and
4 everything. How much did she weigh when she
5 was born?

6 A. Three pounds five and a half ounces.

7 Q. Was she at Texas Children's for
8 awhile?

9 A. No, they didn't transfer her out.
10 She stayed at Parkway.

11 Q. My nephew was a premie. He is like
12 this big. And now, as an eleven year old, he's
13 the biggest one on his little league team.

14 A. This is my second premie, so I am used
15 to it.

16 Q. You obviously take your role as a
17 mother and it appears your husband takes his
18 role as a daddy fairly seriously just by your
19 answers here on the questions. You are the only
20 panelist that I have seen that actually listed
21 mommy and daddy as their other jobs.

22 A. It is a job.

23 Q. I am sure it is.

24 Do you have an opinion, or at what
25 age, or do you think there is an age of a

1 child's life that is more important than other
2 ages as far as developing their character,
3 setting their personality, things that might
4 have just kind of molded them for how they might
5 be later in life?

6 A. It would be from the time before they
7 are born all the way up to thirteen, fourteen.
8 It could even go as high as that. It just
9 depends.

10 Q. You are even looking at prenatal?

11 A. Right.

12 Q. Depending on the type of prenatal care
13 the mother received and what she may or may not
14 have received?

15 A. Right. My older, I was away from her
16 for four days. My baby stopped moving. They
17 develop character I believe from the time they
18 are in the womb.

19 Q. So if you were to hear testimony in a
20 case about something, some type of deprivation
21 or abuse or something like that that that child
22 received at very early age, is this a factor for
23 whatever weight you might give it, is this a
24 factor that you could take into consideration
25 when it came time to decide punishment?

1 A. Yes, it would be.

2 Q. Do you think that there are people
3 that for whatever reason -- it might be
4 upbringing or whatever -- just live better and
5 react better living in the structured
6 environment of a prison as opposed to being out
7 in free society where there are a lot of choices
8 that confront them on a daily basis? Do you
9 think there are people that get along better
10 with that structure?

11 A. There might be.

12 Q. In looking at issue number one where
13 it talks about where you have to decide beyond a
14 reasonable doubt that there is a probability, we
15 have a couple of little hurdles. Beyond a
16 reasonable doubt that there is a probability
17 that this person is going to commit criminal
18 acts of violence that would be a continuing
19 threat to society. Our courts have told us in
20 the past that society includes not only the free
21 society, and that is normally what springs to
22 everybody's mind because that is where we all
23 live, but the word society also includes the
24 prison society. I am sure you probably haven't
25 ever thought about it in that regard, but could

1 you understand how that might be the case?

2 A. Yes.

3 Q. In looking at that question, as a
4 juror, would you be able to, whatever the
5 evidence you might receive in both stages of the
6 trial, be able to plug into that question and
7 before you answered that question yes be
8 convinced beyond a reasonable doubt that there
9 is a probability that this person is going to
10 commit continuing criminal acts of violence that
11 is going to be a danger to prison society as
12 well as free society; or in lieu of free
13 society, you would look at both areas of society
14 there in answering that question. Could you do
15 that?

16 A. Yes.

17 THE COURT: Hold up just a second.
18 Could I ask you to step outside this door just a
19 moment. I need to take something up.

20 THE JUROR: Kicking me out.

21 THE COURT: Just briefly.

22 (The prospective juror is removed from
23 the courtroom).

24 MS. DAVIES: The State will use a
25 peremptory challenge.

1 THE COURT: That is a peremptory
2 challenge as to prospective juror number six,
3 panel two, Ms. Milsaps.

4 ELAINE C. JONES,
5 called as a prospective juror, was examined as
6 follows:

7 EXAMINATION BY THE COURT

8 Q. This is prospective juror number seven
9 on panel number two, Ms. Elaine C. Jones.

10 How long have you been doing work at
11 M.D. Anderson as a research RN?

12 A. Three and a half years.

13 Q. You were in the operating room before
14 that?

15 A. Yes.

16 Q. Two children. Youngest one is at UT
17 studying what?

18 A. She's in government. She's hoping to
19 go to law school. She finished her freshman
20 year, getting ready to start her sophomore year.

21 Q. New Canaan High School. I guess
22 Connecticut.

23 A. Yes, sir. My dad was transferred to
24 New York. We lived in Connecticut at that time.

25 Q. You began as premed?

1 A. Yes, sir.

2 Q. And then you transferred to Baylor?

3 A. I got married. When I got divorced, I
4 went back to school.

5 Q. Last movie "Dying Soon"?

6 A. "Dying Young".

7 Q. On pages eight and nine of your long
8 form questionnaire they ask you to check a
9 statement which best summarized your views about
10 capital punishment and the death penalty or ask
11 you to either agree or disagree with certain
12 statements they wrote. And it appears, in
13 summary, you wish capital punishment weren't
14 necessary but believe it is necessary for some
15 offenses?

16 A. Exactly.

17 Q. And, at any rate, your decision on
18 whether or not the death penalty should be
19 assessed would depend on the facts and
20 circumstances of the individual case. You have
21 never served on a criminal jury in the past.
22 Had you ever been called for jury service and
23 not selected?

24 A. I am shocked. I have been registered
25 to vote for twenty years, and I have never been

1 called. This is my first time.

2 Q. First time called and you get the long
3 form questionnaire?

4 A. Exactly.

5 Q. Do you understand in general terms
6 about these principles I talked to you about
7 yesterday, the presumption of innocence, a
8 defendant is presumed innocent, the burden of
9 proof is on the State. It's always on the State
10 to prove a defendant's guilt beyond a reasonable
11 doubt. Do you agree with that?

12 A. Yes.

13 Q. If a defendant does not take the stand
14 and testify in his own behalf, that can't be
15 used as evidence against him. You can't
16 speculate on things you haven't heard. You have
17 to base your verdict on what you have heard in
18 the courtroom. Do you agree?

19 A. Yes.

20 Q. You didn't know anything about this
21 case.

22 A. No. Actually last night I was
23 thinking, because I remember a neighbor of mine
24 saying that her maid has some friends that were
25 killed, but that was months ago. Nobody said

1 any names. Nobody said anything about the
2 circumstances. I don't even know if it's
3 related, but that is the only thing. I didn't
4 read about this in the paper.

5 Q. Do you know what area that was in?

6 A. No. She didn't know names; she didn't
7 know anything.

8 Q. You have no preconceived notion as to
9 the defendant's guilt?

10 A. No, absolutely not.

11 Q. Before you came in here yesterday, did
12 you understand in general terms what the
13 difference was between murder and capital
14 murder?

15 A. Probably not really, not in definitions.

16 Q. In Texas, we have capital murder
17 offenses and then we have first, second and
18 third degree felony offenses. We did talk, I
19 believe both sides spoke briefly about the
20 possibility of lesser included offenses may be
21 in the Court's Charge, that is, if there was any
22 evidence of any other offenses other than
23 capital murder jurors might look to, that would
24 be in the Court's Charge. The jury may at some
25 point have the opportunity to decide whether or

1 not the defendant is guilty of the offense of
2 capital murder. And if they don't believe that
3 beyond a reasonable doubt, then they might look
4 at some lesser included offenses like murder or
5 down the line voluntary manslaughter or
6 involuntary manslaughter, sort of stair-stepping
7 down the schedule of felony offenses all the way
8 to misdemeanor offenses. By murder we are
9 talking about when someone intentionally or
10 knowingly causes the death of another
11 individual. When we are talking about capital
12 murder, we are talking about that intentional
13 taking of a life plus some other aggravating
14 factor, something that elevates it from a first
15 degree felony offense to capital murder. And in
16 Texas our scheme is that we have six different
17 categories. One is where a person murders a
18 peace officer or a fireman acting in the lawful
19 discharge of an official duty. One is the case
20 where somebody commits a murder for hire. One
21 is where someone murders a person while escaping
22 or attempting to escape from a penal
23 institution. One category is when someone
24 murders an employee of a penal institution while
25 he is incarcerated in the penal institution.

1 The most common type of capital murder offense
2 we see and is covered by the media is where a
3 defendant murders someone while he is in the
4 course of committing another felony like
5 kidnapping, burglary, robbery, aggravated sexual
6 assault or arson. And I believe the examples I
7 gave yesterday were where a lady was kidnapped
8 on a parking lot, raped and murdered. That is
9 capital murder. It's the intentional taking of
10 a life with the aggravating factor. Convenient
11 store robberies in which the clerk is killed
12 during the course of committing robbery. That
13 is a capital murder offense. The sixth category
14 we have is where someone murders more than one
15 person in the same criminal transaction. Could
16 be as few as two people. And we know by
17 reading the indictment to you, you know at this
18 point that that is the allegation in this case,
19 that two people are killed in the same criminal
20 transaction. I believe I told you yesterday
21 that you would receive an instruction that the
22 indictment is no evidence of guilt whatsoever.
23 That just means that we arrive here in court.
24 Do you agree with that?

25 A. Yes.

1 Q. So now you know the type of capital
2 murder scheme we are talking about and the
3 different ways in which the offense of murder
4 can be elevated to capital murder. Are all
5 those the kinds of things that you think should
6 be capital offenses?

7 A. Yes.

8 Q. Do you understand that if someone is
9 convicted of the offense of capital murder there
10 are only two possible punishments, it's
11 mandatory that that person be either sentenced
12 to life imprisonment or the death penalty?

13 A. Yes.

14 Q. Did you understand before you came in
15 here yesterday that after someone is convicted
16 of capital murder the jury does not then retire
17 and decide whether to assess life or death, vote
18 for life or death, we, instead, insulate the
19 jury a bit and insulate the judge a bit by
20 giving you special issues, these questions. Did
21 you know that before you came in here?

22 A. No.

23 Q. Most people don't unless they are
24 lawyers.

25 You will recall that the trial is in

1 two stages. The first stage is what we will
2 call the guilt stage. Evidence is presented,
3 the jury goes back to deliberate, comes back
4 either guilty or not guilty of an offense. If a
5 jury returns a verdict of guilty, there is a
6 second stage of trial, the penalty stage. Each
7 side may present additional evidence. They
8 don't have to but they may present additional
9 evidence. If they don't present anything in
10 addition you may examine everything you saw in
11 the case in chief and go back and determine
12 punishment. If the jury returns a verdict of
13 guilty of capital murder, I submit these two
14 special issues. Number one asks: Do you find
15 from the evidence beyond a reasonable doubt that
16 there is a probability that the defendant would
17 commit criminal acts of violence that would
18 constitute a continuing threat to society.
19 That is where we are asking the jury to make a
20 determination of the defendant's future
21 dangerousness. We focus on that word
22 probability, in common usage meaning more likely
23 to occur than not. Is it more likely to occur
24 than not that the defendant would commit
25 criminal acts of violence constituting a

1 continuing threat to society. I would instruct
2 the jury that they should consider all the
3 evidence admitted at the guilt or innocence
4 stage and the punishment stage including
5 evidence of the defendant's background or his
6 character or the circumstances of the offense
7 that militates for or mitigates against the
8 imposition of the death penalty. So everything
9 you had heard in both stages of trial you can
10 take into consideration when you are making the
11 determination as to issue number one. It takes
12 all twelve jurors agreeing to answer yes. Ten
13 or more can agree and answer that no. If a no
14 answer is returned, you come back in, and I
15 assess the death penalty. I was looking at him
16 and my mouth was running. If a no answer is
17 returned, I assess life imprisonment. If yes is
18 answered, then the jury looks at number two.
19 You don't even move to issue number two unless
20 that yes answer comes on number one. First of
21 all, as to number one, can you see how under
22 some circumstances if you have found a defendant
23 guilty of capital murder you could vote yes and
24 sometimes no, depending on the evidence you had
25 before you as to future probability of dangerous

1 acts?

2 A. Yes.

3 Q. On number two, that is asking
4 something a little bit different. It asks
5 whether taking into consideration all the
6 evidence, including the circumstances of the
7 offense, the defendant's character and
8 background and the personal moral culpability of
9 the defendant there is a sufficient mitigating
10 circumstance or circumstances to warrant that a
11 sentence of life imprisonment rather than a
12 death sentence be imposed. There is not
13 another stage of trial between your answering
14 issue number one and issue number two. If you
15 find someone guilty of capital murder and there
16 is a second stage, you go back and answer these
17 two questions while you are out deliberating.
18 If you answer number one yes, you look at number
19 two and you answer that. There is no burden of
20 proof assigned to issue number two. That is
21 saying you can reconsider everything before you,
22 anything that is mitigating in your mind you may
23 look at, and even though you have decided there
24 is a probability that the defendant on trial
25 would commit criminal acts of violence

1 constituting a continuing threat to society, you
2 can determine whether or not there is something
3 else, there is something else, sufficient
4 mitigating circumstance or circumstances that
5 would warrant you in saying that life
6 imprisonment should be imposed rather than
7 death. It's another way for the jury to say we
8 think life should be imposed in this case. Do
9 you see how under some circumstances that could
10 be answered yes and under some circumstances no
11 even though you had previously answered number
12 one yes?

13 A. Yes.

14 Q. If the jury answers yes to number two,
15 I assess life imprisonment. If they answer no,
16 after having previously answered number one yes,
17 I assess the death penalty. You get to know
18 that in advance. What is important is that you
19 see that these aren't automatic answers yes or
20 no to either one of these issues and that you
21 are not predisposed to always answer one of
22 these issues a certain way so as to insure that
23 either the death penalty would be imposed or
24 that a life sentence would be imposed. Do you
25 understand and agree?

1 A. Yes.

2 Q. When we are talking about mitigating
3 evidence, we are talking about in general terms
4 evidence that is relevant to a defendant's
5 character, record, any circumstances of the
6 offense, anything which might serve as a basis
7 for the sentence less than death. I can't give
8 you an all inclusive list of what are mitigating
9 evidence, mitigating circumstances. We know
10 that mental retardation, mental illness can be
11 mitigating evidence. Other things might include
12 child abuse, a defendant's good behavior in
13 prison or in jail, whether or not a defendant
14 had an exceptionally unhappy or unstable
15 childhood, child and drug abuse, economic
16 deprivation, voluntary intoxication, drug
17 dependency, illiteracy, opinion testimony of lay
18 witnesses or psychiatric opinion testimony that
19 a defendant would not be a danger in the
20 future. All those things can be mitigating
21 evidence. We just don't have, in plain words,
22 the things identified that are mitigating
23 evidence for the jurors. And there is no
24 formula that is imposed on the jurors as to
25 determine the weight that they may assess on

1 each one of these mitigating factors if they
2 determine that each one of these circumstances
3 is a mitigating circumstance. That is up to the
4 jury to decide.

5 Do you have any questions about
6 anything I have said so far?

7 A. No.

8 Q. Is there anything regarding your views
9 on capital punishment or the death penalty which
10 would either prevent or substantially impair the
11 performance of your duties as a juror in
12 accordance with the instructions I would give
13 you and your oath as a juror?

14 A. No.

15 THE COURT: Ms. Davies

16 EXAMINATION BY THE STATE

17 BY MS. DAVIES:

18 Q. Ms. Jones, what was your first
19 reaction when you realized that here your first
20 time to come down for jury duty and you are
21 being called over on a case that may very well
22 involve the death penalty? How did you feel?

23 A. Uncomfortable. It's a very serious
24 situation, and I take it very seriously.

25 Q. I would hope so. I think most people

1 do. When did it hit you, when you were filling
2 out the questionnaire?

3 A. Oh, it was fairly obvious.

4 Q. Not too subtle?

5 A. Not too subtle.

6 Q. You said it made you feel
7 uncomfortable?

8 A. Well, it's not -- I have very strong
9 views about it, so it's not that. I have
10 just -- I expected to be on some little civil
11 something or another when I was called right at
12 the beginning. I was a little bit surprised but
13 not uncomfortable to the point that I don't want
14 to do it. I wouldn't or would feel
15 uncomfortable making a decision about, for
16 instance, these questions, et cetera. Just the
17 seriousness of it more than anything.

18 Q. You say you have strong views on the
19 subject. We asked you at least twenty different
20 ways, probably more than that, but just in your
21 words can you tell us what your attitude is
22 toward the necessity for the death penalty?

23 A. As he summarized, I feel, I wish that
24 it would not be necessary. I do feel that there
25 are some circumstances in which a person would

1 have to pay with his life for taking someone
2 else's life. There are also extenuating
3 circumstances that it would not be necessary,
4 that life imprisonment would be possible, too.
5 I mean, I would have to know the facts before I
6 would make any type of decision, but I would be
7 able to go either way.

8 Q. For many people who can have very
9 strong beliefs in terms of an abstract
10 discussion and, yet, for them, when they are
11 confronted with a situation where they would be
12 personally involved in a case that resulted in
13 the death penalty, they have to say, well, I
14 have come face to face with this and I realize
15 -- I think it's necessary, I think it needs to
16 be part of society, other people, you know, I
17 want it to continue, but I can't be a part of
18 this. Did you have any thoughts of that?

19 A. No.

20 Q. I assume you gave this some thought
21 last night after you left here?

22 A. Oh, absolutely. I deal, I mean, my
23 job is a very serious job as well, and I deal
24 with a lot of cancer patients, and most of my
25 patients die because of the type of cancer I

1 take care of. And, believe me, I know the
2 seriousness of it. And, yes, I did give it
3 thought.

4 Q. Given that time to sit back and think,
5 do you feel like -- was there anything that
6 after twenty-four hours of consideration that
7 you would want to change about the way you would
8 have answered these questions yesterday?

9 A. I don't think so.

10 Q. One of the things that I noticed, we
11 ask the question about what the objective of
12 punishment, primary objective should be, you
13 mentioned, hopefully, rehabilitation as well as
14 you mentioned prevention, that you made a point
15 to mention that you hoped for rehabilitation.
16 How optimistic a person are you I guess is what
17 I want to know. What are your expectations of
18 rehabilitation?

19 A. To be honest, I know very little about
20 in the prison system what type of rehabilitation
21 is offered. I really honestly don't know. I
22 do believe that some people can possibly
23 become -- this is a different case, but some
24 people could possibly become, you know, decent
25 citizens with help. I am not real optimistic.

1 I know reality. And there are times that it
2 would not be possible.

3 Q. Obviously the death penalty is pretty
4 final. Obviously, if that death penalty is
5 imposed, the jury has given up on
6 rehabilitation. I guess that is what I am
7 trying to find out from you. Are you one of
8 those people who think anyone at any point
9 deserves a second chance?

10 A. No. It depends on the
11 circumstances. But, no, I am not -- I see
12 reality, and what reality is in life, and it's
13 not possible sometimes. It's just not.

14 Q. At this point, you certainly don't
15 strike me as a person who is looking to answer
16 those questions one way or the other every
17 time. Am I?

18 A. No, I am not looking to answer
19 anything. I wouldn't know what to answer, to be
20 honest. I am just, you know, going to be
21 honest with you about how I feel.

22 Q. We have described these issues as a
23 way of insulating the jury. It's a pretty thin
24 insulation, to my way of thinking. True, if you
25 are on the jury you are not called upon to write

1 death in red letters across the verdict page,
2 but you know what the result of your yes or no
3 answer is. So, clearly, anyone is capable of
4 manipulating those answers to accomplish the
5 purpose that you might have. In your line of
6 work, I would think your whole approach is
7 reverence and attempt to save life, so that
8 makes me wonder, you know, would you be doing
9 violation to your--

10 A. No. I was thinking about that as
11 well as religious beliefs last night and this
12 morning. I am comfortable with it. I am very
13 comfortable with it. I am a Christian as well,
14 but I just truly feel that there are some
15 circumstances that it is necessary, and I would
16 not have a problem with doing it. I wouldn't
17 jump at it. I don't think that every person
18 that has murdered someone necessarily needs to
19 die. I think there are extenuating
20 circumstances. I am sure there has been in the
21 past. But I would not have a problem answering
22 yes.

23 Q. Well, clearly, we want to be sure --
24 the judge has already told you anybody who sits
25 on this jury is the kind of person who could

1 answer those questions either way, and then it
2 also would be just as obvious as I talk to you
3 and Mr. Stafford we are on opposite sides of
4 this. I am going to be asking for the death
5 penalty. So, I want to know that there is
6 somebody -- that the people on the jury can live
7 with themselves if they do that, if they put
8 their name on a verdict that would result in the
9 death penalty.

10 A. I understand.

11 Q. So, you feel like you could?

12 A. Yes, absolutely.

13 Q. If the evidence was there that
14 convinced you beyond a reasonable doubt?

15 A. Yes.

16 Q. What about your children? You have
17 got children of an age that they tend to have
18 opinions about things like this, and you have a
19 daughter who is studying government, pre-law. I
20 suspect she's the kind of young woman who has
21 her own opinions on things. Have you ever
22 discussed, do you know what her attitude would
23 be toward the death penalty?

24 A. No. She wasn't at home last night or
25 she would have asked.

1 Q. Is there anybody in your life, family,
2 friends, anyone who you think would disapprove
3 of your decision if you were on a jury that gave
4 the death penalty?

5 A. No. I talked to my parents last
6 night, and they know that if I was chosen for
7 this jury that that is what I would be doing.
8 Nothing was said. We all have our own opinions
9 and we basically respect each other's opinion.

10 Q. There is nobody who you would feel
11 pressured or inhibited in making your decision?

12 A. No.

13 Q. I noticed, apparently, someone in your
14 family, perhaps yourself, had seen -- there is a
15 question here: Have you or a member of your
16 family consulted a psychiatrist or psychologist.

17 A. I did after divorce, during the
18 divorce went to a counselor.

19 Q. Do you have any dealings through your
20 training or even professionally with any
21 psychologists or psychiatrists?

22 A. No. We consult and, you know, if we
23 feel that need in our patient we consult with
24 them, send them for consultation, but, no. I
25 have had training, obviously. I mean,

1 somewhat. I took a lot of that in college
2 because of the degree I was getting, but.

3 Q. I guess in this kind of case -- I
4 don't know what the evidence will be. In
5 criminal cases, the discovery is not
6 reciprocal. You hear in civil cases how it goes
7 back and forth. I have no right to discover
8 what the defense case will be. They have
9 certain rights, things I have to turn over to
10 them so that they know what the State's case is,
11 but it's not a two-way street. So I have no way
12 of knowing what the evidence will be in this
13 case, but from experience I can know in this
14 type of case it would not be uncommon at all for
15 there to be some psychiatric testimony, a
16 psychologist, some kind of expert coming in and
17 talking about the person's background, something
18 that might try to explain why they are the way
19 they are. So I am interested to know what your
20 feeling would be about that type -- say if a
21 psychiatrist or an expert of that type came in,
22 do you feel like that is a particularly exact
23 kind of science to make a decision on?

24 A. No. It's another facet of
25 information. I don't believe that a

1 psychiatrist or, say, a psychologist that was
2 there would be one hundred percent on the
3 money. I don't necessarily believe that. I
4 think it can be taken into consideration, but
5 definitely not, I mean, they are people as well,
6 and there is bias in everyone's decision even
7 with the examinations they give, et cetera. I
8 think it would just be a portion of
9 information. Certainly not every bit of
10 information.

11 Q. Do you feel like in some instances
12 just a commonsense approach could be, in terms
13 of evaluating human conduct, could be as valuable?

14 A. Not necessarily as valuable. It could
15 be as valuable, but I just -- I would not I
16 think put total credence in something that a
17 psychiatrist or psychologist inferred about
18 someone else.

19 Q. But it's something that you would
20 consider?

21 A. I would consider it.

22 Q. If that was part of the evidence.

23 We went over so many things
24 yesterday. Did any of them -- anything you gave
25 thought to that you had a question or?

1 A. No, not really.

2 Q. Or wanted to explore. We talked about
3 the burden of proof. We kept using that term
4 beyond a reasonable doubt, beyond a reasonable
5 doubt, convinced beyond a reasonable doubt, we
6 would throw it out, but I don't think we really
7 talked about it in any depth. The legal
8 standard says it's beyond a reasonable doubt.
9 To find the defendant guilty of capital murder
10 -- in fact, that is the same standard on any
11 criminal case from, you know, misdemeanor
12 offenses on through capital murder. It's all
13 the same, beyond a reasonable doubt. There is a
14 lengthy definition. I won't go into the whole
15 lengthy one. It's a high standard, no question
16 about that, but the instruction the judge will
17 give you makes clear that it's not beyond all
18 doubt.

19 A. Right.

20 Q. Now, at this point our main concern is
21 to know how you feel about things. Some people
22 will come in here and tell us that they don't
23 care what the legal standard is, lady, if you
24 are going to be asking me to give the death
25 penalty you are going to have to remove all

1 doubt from my mind. That is practically an
2 impossible standard. I need to know how you
3 feel about that.

4 A. I think that is impossible. The only
5 way it would be possible is if I was there.

6 Q. True.

7 A. So, it would have to be reasonable.

8 Q. So, do you feel like the legal
9 standard is an appropriate one?

10 A. Yes.

11 Q. We touched on this yesterday, the
12 issue of intent, because I have to prove that
13 two people, the defendant killed two people
14 intentionally during the same criminal
15 transaction. We are not talking about
16 premeditated but just intentional. My
17 suggestion is that you can form the intent,
18 anyone can, the intent to act very quickly. I
19 don't have to decide before I leave the house
20 this morning that I am going to run a red light
21 for it to be intentional. As I'm approaching
22 the corner and I see the light change and just
23 say, oh, heck, I am going on. The thought
24 process there, I have reached my decision, I am
25 acting intentionally, but it was a very

1 spontaneous spur of the moment decision. How do
2 you feel about that? I am saying the same kind
3 of thinking would apply to the decision to
4 commit murder.

5 A. I agree with that. It doesn't have
6 to be something you planned for a month or two
7 weeks or ten minutes ago. The red light
8 example, if I look up a five second moment and
9 make the decision to run that red light, I have
10 intent to do it. So.

11 Q. If you apply that kind of definition
12 of intent to a murder situation, would it seem
13 less serious a murder to you if someone decided
14 on the spur of the moment to kill as opposed to
15 one that they planned ahead?

16 A. No. Murder is murder.

17 Q. One of the things I didn't touch on
18 yesterday is the issue of self-defense. Anytime
19 you are talking murder of any kind that is an
20 issue that can come up. Someone starts talking
21 about self-defense, most of us feel strongly
22 that a person, we all have the right to defend
23 ourselves. Do you agree?

24 A. Absolutely.

25 Q. And the law does, too. The law

1 certainly includes the right of self-defense or
2 even the defense of another person. If you were
3 at work and someone came in and was robbing, you
4 would have the right to protect yourself or a
5 third person if you were being victimized. I
6 want to mention that because certainly the law
7 does include the right to self-defense. The
8 right of self-defense applies to a person who is
9 acting lawfully, not to the wrongdoer. In other
10 words, if a defendant went into the convenient
11 store to rob the clerk and then, you know, said
12 give me all your money, the clerk reaches under
13 the counter and pulls a gun to defend himself
14 and the robber then shoots the clerk, he would
15 not have a legal right to come into court and
16 say, hey, I had to defend myself, he pulled a
17 gun on me, because he was breaking the law to
18 begin with and the clerk would be acting within
19 the law in trying to defend himself. Does that
20 make sense to you?

21 A. Yes.

22 Q. Okay. Let's talk about these issues
23 a little bit. Since you haven't been on a jury
24 -- I don't want to belabor this, but since you
25 haven't been through the process like some

1 people have. You understand it's a two stage
2 trial. At the first stage of trial, that is the
3 guilt stage, the only evidence that is going to
4 be admissible is evidence that relates to this
5 particular capital murder.

6 A. To that issue only.

7 Q. That issue only, just a very limited
8 did he do this crime. Is he guilty of the
9 capital murder. So that is why you probably
10 hear people talk about: Oh, I was on a jury,
11 they didn't let us know anything about this
12 guy. Well, it's not relevant. The idea is at
13 that first stage of trial the person should be
14 tried only for this act, not for what they may
15 have done in the past. So that is why the jury
16 doesn't get to hear that kind of thing. After
17 they hear all the evidence, the judge gives the
18 instruction, the attorneys for both sides argue,
19 then the jury goes back into the jury room to
20 decide that issue of guilt. There is never any
21 expectation that a jury makes an instantaneous,
22 unanimous decision, you know, the expectation is
23 that is what is called deliberating. You are
24 going to sift through the evidence. You are
25 going to discuss it with the other jurors before

1 you reach your decision, and it has to be a
2 unanimous verdict for there ever to be a guilty
3 verdict. At that point then the jury would come
4 back into the courtroom, deliver their verdict.
5 It's only after you have gotten a verdict of
6 guilty of capital murder that we ever get to
7 this second stage of trial. Now, at the second
8 stage of trial there is the potential for
9 additional evidence. Not always. There will be
10 times, can be times where I might be asking a
11 jury to give the death penalty or answer these
12 questions where it would result in the death
13 penalty just based on the facts of that capital
14 murder alone, that they are so brutal that
15 should be enough to convince you that this
16 answer should be yes or no. Can you see that
17 there might be some instance where, without any
18 other background information, any other criminal
19 history, that just the facts of that particular
20 capital murder alone would justify the death
21 penalty?

22 A. Yes.

23 Q. In other instances you will get more
24 information. And that kind of additional
25 background information would come in at that

1 second stage, the punishment stage of trial.

2 A. I think it would take a lot, but, yes,
3 I do think there are some circumstances that it
4 could be done.

5 Q. You would like to have additional
6 information, I am sure.

7 A. I am sure, but if you don't.

8 Q. Of course you would. My concern is
9 to know would you always require?

10 A. No.

11 Q. Okay.

12 A. Not always. I would prefer it but not
13 always.

14 Q. At this second stage of trial -- I was
15 drawing this up here when I was talking to
16 somebody else. This is this big ball of
17 evidence. And, so, at this second stage you are
18 going to consider all of it, the whole ball of
19 wax. It's going to include the evidence you
20 have heard about the offense, the capital
21 murder, and if there was additional evidence
22 brought to you about the defendant's background,
23 good or bad. I mean, there is always the
24 potential for, if there have been other criminal
25 acts, convictions, or maybe it's good stuff, he

1 was a deacon in the church, an honor student,
2 whatever the evidence may be, background,
3 character, any personal data. Some of the
4 things that may be characterized as mitigating
5 evidence may be brought in by the defense. They
6 never have any obligation to bring in anything
7 at any stage of trial. So those things may
8 become apparent during the State's case, you
9 know. The description and the appearance of
10 the defendant would indicate perhaps he would be
11 particularly young or perhaps during the course
12 of the offense, I mean, you might have a witness
13 describe what happened, and say in a capital
14 murder situation maybe one person was killed,
15 another witness survived that described some of
16 the things that the defendant said during the
17 offense that, you know, he might, say, if it's a
18 murder during the course of a rape, tell this
19 woman, as he is torturing her and raping her,
20 hey, you know, does that hurt, sure, it does.
21 I am going to treat you like my mother always
22 treated me. You could come up with information
23 that would suggest that he was abused as a child
24 or whatever. Or had a low IQ because of the
25 way he talked. But at any rate the point of

1 that is you don't ever look to the defense to
2 put on evidence, but wherever the evidence came
3 from you consider all of it when you are
4 addressing these two questions. Same evidence
5 but different focus as you are addressing the
6 question.

7 Let's take that first one. Talks
8 about probability of future dangerousness. Not
9 a certainty but a probability. It's kind of
10 predicting the future, how somebody is going to
11 behave in the future. Is that too much like
12 gazing in a crystal ball, or do you think you
13 can be convinced to answer that question yes
14 based on the evidence?

15 A. I could answer it yes.

16 Q. It talks about criminal acts of
17 violence. It doesn't say he is probably going
18 to kill again. It talks about criminal acts of
19 violence that would constitute a continuing
20 threat to society. To your way of thinking,
21 are there other criminal acts that would be a
22 continuing threat short of murder?

23 A. Yes, there could be.

24 Q. Okay. If you answer that question
25 yes, if you were convinced by the evidence

1 beyond a reasonable doubt that it should be,
2 could you do that, knowing that that is one step
3 closer to the death penalty?

4 A. Yes, I could.

5 Q. If the jury has answered that yes
6 unanimously, then they move to that second
7 question. And I may be taking too many
8 liberties in paraphrasing it, but basically, as
9 I read that, it sounds like what it's saying
10 is: Okay, you have decided he is a continuing
11 threat to society, now look at this evidence
12 again, be sure you don't overlook the mitigating
13 stuff that is in there, if there is anything.
14 In some cases there may not be other things. In
15 other cases there may be a lot. But be sure you
16 consider that, but you also still consider the
17 circumstances of the offense, in effect,
18 re-weigh it. Do you think there is enough
19 mitigating evidence in there to warrant backing
20 off the death penalty and giving him a life
21 sentence. And if your answer is yes, he should
22 get a life sentence. If ten agree on it, that
23 is what the judge does. If your answer is no,
24 all twelve have to agree, the death sentence
25 results.

1 Do you see -- I am concerned about
2 this because I noticed on your questionnaire you
3 talked about, in answering one question, about
4 people who are likely to commit crimes and their
5 background, a reference to disadvantaged
6 childhood, that kind of thing. Can you ever see
7 yourself, when there is some mitigating
8 evidence, thinking that, yes, there is a sad
9 story here and sad background but it's not
10 enough?

11 A. Yes. For me, I am a researcher, I
12 think very analytically. I am very in order.
13 I think there would be a line for me, and I
14 don't know where it would be. That there would
15 be a time I could say yes to that. And there
16 would be a time to say no. I think -- I know I
17 could do either; I just do not know where that
18 line is. I would know for me.

19 Q. There is all kinds of things that can
20 be mitigating. We know some things that the
21 courts have said in the past are properly
22 considered to be mitigating. I mean, what is
23 mitigating to one juror may not be to another.
24 For example, drug usage. You know, some people
25 think that might be aggravating, another person

1 mitigating. And they are going to give it
2 different weight. We are not going to ask you
3 what weight you would give to any one factor.

4 A. It would be a combination for me, I
5 would imagine. A combination of factors.

6 Q. And perhaps hearing it in the
7 context. I mean, one factor may be heavier in
8 one case than in another, depending on the
9 context. Someone who has had a very tragic
10 childhood at a young age, certainly I think we
11 would all feel sympathy and consider that to be
12 mitigating. Do you think that that would
13 diminish or that negates personal
14 responsibility?

15 A. Certainly not.

16 Q. Entirely?

17 A. Certainly not, but.

18 MR. STAFFORD: Making reference to
19 guilt or innocence or punishment? I think that
20 is misleading the juror as to what she means.
21 Is she talking about punishment or guilt or
22 innocence?

23 THE COURT: Rephrase the question.

24 BY MS. DAVIES:

25 Q. Well, our discussion was in the

1 framework of punishment.

2 A. Well, a bad childhood, I mean, my
3 goodness, everyone at some point has a
4 dysfunctional family, I think, but a bad
5 childhood alone probably not. I don't know what
6 combination or what one thing would make me
7 answer that yes. I can't tell you that.

8 Q. Well, and I am not asking you to tell
9 me that. I think it would be inappropriate for
10 me to ask or expect you to be able to come up
11 with an answer as to what weight you would give
12 any factor. Our concern would be to be sure
13 that you would consider anything mitigating. I
14 mean, there may be a really sad story about a
15 tragic childhood. Whether in the context of
16 the case you are hearing it would be enough for
17 you to come up with a yes or no answer is
18 another thing.

19 A. Right.

20 Q. Would you be able to consider any and
21 all of the evidence, the mitigating evidence,
22 aggravating evidence, all of it, in order to
23 reach a decision?

24 A. Absolutely. That is what you have to
25 do.

1 Q. Without prejudging what weight you
2 would give to any aspect?

3 A. Oh, no. I would have to have all the
4 information.

5 Q. I think I am understanding you to tell
6 me that you would answer either one of those
7 questions yes or no just depending on the
8 evidence. You are not going into this--

9 A. No, I don't feel that every person
10 that commits murder needs to be sentenced to
11 death. I think it is a possibility -- I think
12 it in some cases should be done and in some
13 cases it should not be done.

14 Q. And you would be able to consider all
15 of that background evidence?

16 A. Absolutely.

17 Q. As well as the evidence of the offense
18 in making your decision?

19 A. Yes.

20 Q. Has anything else come to your mind
21 that you want to share with us or ask about?

22 A. No. You did a very good summary
23 yesterday. Answered all my questions, anyway.

24 Q. Thank you. I pass.
25

1 EXAMINATION BY THE DEFENSE

2 BY MR. STAFFORD:

3 Q. Were you raised in the New Canaan area
4 as a kid?

5 A. No, I was born in Tyler. We moved to
6 Houston.

7 Q. How old were you when you came to
8 Houston?

9 A. Four.

10 Q. You are basically a Houstonian?

11 A. Right. We moved to New Orleans, back
12 to Houston, New York, Overseas and back here.

13 Q. Your father was with the military?

14 A. No, with Exxon.

15 Q. What did he do?

16 A. He just retired a few years ago. He
17 was the manager of all the international
18 drilling and exploration for Exxon.

19 Q. Did he stay in the office or was he
20 out in the field?

21 A. Office. Traveling a lot to other
22 countries.

23 Q. But would he actually go out in the
24 oilfields to see what was going on?

25 A. No. He did when he started with

1 Exxon, I believe.

2 Q. What is his educational background?

3 A. He graduated from Duke University.

4 Q. Okay. Was he originally from the
5 South?

6 A. South Carolina. Grew up on a farm.

7 Q. How about your mom?

8 A. Texas. She's from Wichita Falls.

9 Q. Close to Olney, Texas?

10 A. Yes.

11 Q. My hometown where I was born. Any
12 memory about Tyler at all?

13 A. No.

14 Q. Where were your grandparents? Are
15 they in Wichita Falls?

16 A. Right, and South Carolina.

17 Q. Spend very much time in Wichita Falls?

18 A. Very little. We would go visit once
19 or so a year maybe. They would come to our
20 house a lot.

21 Q. And where did you go to junior high
22 school? In New Orleans?

23 A. New Orleans and Houston. High school
24 started in Houston and then finished in
25 Connecticut.

1 Q. How did you pick SMU to go to school?

2 A. My mom had gone there. And I had
3 five other friends, we all were from New Canaan,
4 Connecticut, came down to SMU. It was
5 amazing. They were shocked. They had never
6 heard of New Canaan, Connecticut, and six of us
7 went down there. I wanted to move back to
8 Texas.

9 Q. You graduated SMU?

10 A. I didn't graduate from SMU.

11 Q. You had it in here what year you
12 left.

13 A. '72. And I went back to school in '78
14 to Baylor in Dallas the last two and a half
15 years of bachelor's degree for nursing.

16 Q. So what I am gathering your premed was
17 interrupted by marriage and children?

18 A. Right.

19 Q. Any regrets?

20 A. Yes, sometimes. More than anything,
21 I will be honest, financially because I have
22 been a single parent. It's not easy.

23 Q. How long have you been a single
24 parent?

25 A. I remarried and divorced, and I have

1 been single since '85. '84 or '85.

2 Q. I gather from your paper you had the
3 smarts, this other intervening circumstance that
4 happened that prevented you from becoming a
5 doctor. How did you choose the cancer research
6 and the cancer nursing?

7 A. Actually my neighbor and friend was in
8 research nursing. I was getting very burned out
9 in the operating room as well as just getting
10 too old for it. I mean, we had to take call,
11 and you would be up all night, plus have to be
12 back at work at 6:40 in the morning. I just
13 couldn't do it anymore.

14 Q. Was the emergency room?

15 A. Operating room. It was St. Johns.
16 I live in Clear Lake.

17 Q. Basically any type and all types of
18 surgery?

19 A. Oh, yes. I trained at Baylor. I did
20 a year's internship in Dallas in surgery. All
21 areas. And then went into open heart for
22 awhile. Did that until I moved down here.

23 Q. It may appear that I am playing mind
24 games with you, and I may be. How do you
25 explain the work that you do in the cancer

1 patient trying to save lives and then your views
2 on capital punishment of taking a life? I see a
3 conflict there.

4 A. I don't see it. I don't see a
5 conflict. I mean, as I said, I think there are
6 circumstances in which it is inappropriate to
7 vote for whatever, for death sentence. But I
8 think if certain situations and certain
9 circumstances it is possible or plausible more
10 than anything. I know it seems -- it seems that
11 way. As I said, even my Christian views, you
12 know, I am comfortable with it.

13 Q. Because I see some sort of cancer, for
14 example, that I have no control over, something
15 happens that we are still trying to figure out
16 the answer of why is cancer. I am sure there
17 are other types of cancer, that you can trace my
18 eating habits and the way I took care of myself
19 that contributed to that I personally had
20 control over. I can see a difference. End
21 result is still going to be the same. Same way
22 with an individual trying to determine whether
23 someone dies or lives. You could have an
24 individual that we could bring you testimony
25 that he did what he did because of something

1 that happened to him in his childhood. It's
2 almost you could predict where he was going.
3 He had no control of his destiny almost.
4 Certain factors that control him versus an
5 individual who sat around and plotted for ages
6 of how to kill his wife and collect the
7 insurance, for example. I mean, he went through
8 great schemes. To me, you had to look at the
9 two to determine whether one lives or dies.
10 Both did horrible deeds; wouldn't you agree?

11 A. Yes.

12 Q. One of them did it out of hunger for
13 money and one was reacting because of something
14 that his parents or something that happened in
15 his childhood. Do you see any difference?

16 A. Oh, yes. The mitigating
17 circumstances. There can be.

18 Q. Same way with Ms. Davies' hypo about
19 the Utotem or the Seven-Eleven. Seven-Eleven is
20 the days of our past. But you could have a
21 situation where the shop owner was out in the
22 driveway sweeping and he could be having words
23 with somebody, and the guy pursues him to find
24 out why they were fussing and they get into
25 fisticuffs and he takes the guy's life. He

1 didn't go in there with the intent to rob him.
2 He didn't go in there with the intent to commit
3 any other type of felony, it's just they have
4 words and they get in a fight and you believe he
5 unjustifiably took his life. And in the course
6 someone could walk out of the back room, for
7 example, and surprises him, and you could see in
8 that situation where maybe he did act in
9 self-defense and he kills him.

10 A. Uh-huh.

11 Q. You end up with two dead bodies. One
12 could be unjustified, one could be
13 self-defense. See what I am saying?

14 A. Yes.

15 Q. And this is where Our Honor spent time
16 with you for lessers and self-defense and things
17 of that nature. You may get into a situation in
18 a jury trial, for example, where the court will
19 give you a charge before you can find someone
20 guilty of capital murder you have to believe
21 that he intentionally killed both of them. That
22 basically you are ruling against me on
23 self-defense. Okay?

24 A. Uh-huh.

25 Q. Intentionally on both of them. But

1 then you may be in a situation -- also we talked
2 about lesser included offenses where you could
3 go to murder, aggravated assault, et cetera, et
4 cetera. But you also could be put in a
5 situation where there is no lesser included.
6 That is our hypothet. There is no lesser
7 included, there is going to be either not guilty
8 of capital murder or not guilty, the guy goes
9 home. It may be a situation where you think he
10 intentionally took one life, he acted in
11 self-defense on the other. If you followed your
12 oath in that situation, you would have to find
13 him not guilty of capital murder and let him
14 go. Some jurors' strong beliefs are such I
15 couldn't do that in that situation. He killed
16 one body intentionally, I know he did, it's no
17 doubt in my mind he did it, he needs to be
18 punished, and I ain't going to let him go. Do
19 you think you could follow your oath in that
20 ridiculous situation?

21 A. Yes.

22 Q. Okay.

23 A. We touched on that yesterday. Yes.
24 It may be unpalatable, but, yes.

25 Q. What is mitigation to you? What are

1 certain mitigating factors that you would take
2 into consideration?

3 A. Oh, goodness.

4 Q. What would be mitigating at the time
5 of punishment? You kind of ruled out bad
6 childhood in a way.

7 A. Oh, no, I mean, there could be a
8 combination of things.

9 MS. DAVIES: Your Honor, I have to
10 object to trying to commit Ms. Jones as to
11 exactly what she would consider as mitigating.
12 As long as she would consider any mitigating
13 evidence.

14 THE COURT: I understand. I don't
15 understand the question to be trying to commit
16 her. And certainly the statutes neither
17 identify nor limit the aspects of a defendant's
18 character or record or circumstances that are
19 mitigating. So if you just want to talk about
20 in general terms.

21 A. I honestly don't know. That is
22 difficult.

23 Q. Let me preface this and then I will
24 pin you down. As our statutes didn't tell you
25 and the court will not tell you what is

1 mitigating.

2 A. It's going to be different for each
3 juror, I am sure.

4 Q. Right. So, can you think of anything
5 that is mitigating to you or what is aggravating
6 to you? I mean, you've heard Our Honor throw
7 out certain terms that he suggested were
8 mitigating. Are any of those you would
9 disagree with him?

10 A. No. Maybe a combination of a few of
11 them that I would consider mitigating to be able
12 to say yes to that.

13 Q. Do you think you would have to have
14 more than one?

15 A. No.

16 Q. Because the way the statute was
17 written it says circumstance or circumstances.

18 A. No, I don't. It depends on the
19 circumstances. I am not saying I would have to
20 have more than one, okay? There may be one that
21 I would say yes to.

22 Q. But as far as being able to identify
23 to me what is aggravating and what is mitigating
24 that would be somewhat difficult for you to do?

25 A. Of course it's difficult. You know,

1 the childhood, parents that, you know, taught
2 violence in the home. I don't know. I would
3 have to draw that line for myself when I saw the
4 circumstances.

5 Q. So basically that would be something
6 that you would have to draw from within
7 yourself?

8 A. Yes.

9 Q. As to what is mitigating without any
10 help from the court. Do you think that is fair
11 to you at all, to have to come up?

12 A. No, not without help from the court.
13 The evidence has to be presented. What do you
14 mean?

15 Q. I am saying the court won't tell you
16 what is mitigating and what is aggravating. Do
17 you think that is fair? Do you think you should
18 be left to unbridled discretion to what is
19 mitigating and what is aggravating?

20 A. It may not be fair, but if that is the
21 way we have to do it, it's the way we have to do
22 it.

23 Q. As you look at question number two
24 right now, would you expect me to convince you
25 that there are mitigating factors, or would you

1 expect the State to convince you?

2 A. Well, I would expect you to, to
3 provide information that would have me answer
4 that yes. I mean, I would expect that.

5 Q. As the prosecutor has told you, there
6 may be certain factors that are naturally
7 surrounding the offense itself that she may
8 present you that could possibly be mitigating,
9 such as certain people believe kind in the area
10 that we talked about premeditation, for example,
11 as far as mitigation. They can see a
12 difference a person who sits around and thinks
13 about it a long time, goes through great pains
14 of disguise or weaponry or whatever versus
15 someone who does something out of anger or out
16 of uncontrollable impulse. Someone who didn't
17 show up at the scene with a weapon versus
18 someone who did show up with a weapon. Those
19 little factors could play a part that would
20 naturally come out in the offense itself. More
21 likely than not, as the prosecutor accurately
22 told you, she is not going to go out and talk to
23 the parents and find out what happened to him in
24 the past. They normally don't do that. That
25 is, basically, my job. But I need to know are

1 you placing a burden on me to convince you that
2 these questions should be answered yes or expect
3 me to do that as you sit here now?

4 A. No. As I said, I expect you to
5 provide information. I feel that I would have
6 to be real convinced again beyond the reasonable
7 doubt for both of these, you know, for that to
8 be yes or for that to be no. What each of us
9 finds as mitigating is, again, going to be
10 different for each juror. And since I was
11 unable to give you a perfect example of what I
12 would consider mitigating--

13 Q. Well, in all fairness, I don't know if
14 there is a perfect example. Maybe I am being
15 unfair to you. I don't mean to. Would the
16 fact that you are having to pass judgment on
17 somebody where there is two deceased bodies
18 affect you as you approach question number two?
19 Would that make you more inclined to answer it
20 yes because there is in fact two dead bodies?

21 A. You mean to answer it no?

22 Q. Pardon me. Question number one.

23 A. No.

24 Q. What is your initial reaction about
25 hearing that there are two deceased individuals?

1 A. A murder is a murder, whether it's one
2 or more. Of course it's worse. There are two
3 people that are gone. But it would not preclude
4 me to automatically say yes to issue number one.

5 Q. I noticed you subscribe to a couple of
6 cooking magazines.

7 A. Yes, several.

8 Q. I see "Food and Wine". I hope it's
9 the latter that you are interested in, the wine
10 and not the food.

11 A. I like to cook.

12 Q. You are a cook?

13 A. Yes.

14 Q. You have always been a Republican?

15 A. I guess so. I am more middle of the
16 road, but I would probably tend toward.

17 Q. Your boating activity, tell me
18 something about that.

19 A. I have several friends.

20 Q. Water skiing?

21 A. Sailing and boating. That is why I
22 live down there and drive this awful drive every
23 day.

24 Q. I have one last question. On a scale
25 of zero to ten, zero being cases after someone

1 is found guilty of capital murder you would in
2 very few cases vote for the death penalty, ten
3 being the top end of the scale, that more likely
4 than not you would vote or answer these
5 questions in a way that death would be imposed.
6 If we could put you on a scale of zero to ten,
7 where do you think you would fall? Your own
8 personal beliefs. Forget about the law for a
9 minute. Just your own personal beliefs about
10 the death penalty.

11 MS. DAVIES: Your Honor, I object to
12 asking Ms. Jones how often she's going to vote
13 for the death penalty. She's being asked to
14 commit how often she's going to give the death
15 penalty without knowing what the facts are.

16 THE COURT: Sustained. You may
17 rephrase the question if you would like.

18 BY MR. STAFFORD:

19 Q. From a zero to ten on your strong
20 attitudes for the death penalty, let's forget
21 about the special issues.

22 A. I can answer it. I would have to
23 probably say I would probably be a five. I
24 mean, I hate to be trite, but that is probably
25 where I am.

1 Q. I have to be real honest with you, the
2 problem I am having with you is that every
3 question or response is that I have to wait and
4 hear the evidence. I still don't know anything
5 about you other than I know you are going to
6 wait and hear the evidence. I am trying to get
7 into my mind -- I guess I am like a frustrated
8 psychiatrist trying to figure out how you are
9 going to weigh something and what you are going
10 to do because of what you believe, because on
11 paper it appears that you are a strong believer
12 in capital punishment, so I don't know whether
13 in most cases you favor the death penalty, in
14 most cases you favor life.

15 A. I don't think so.

16 Q. I don't know how to gauge you. See
17 what I am saying?

18 A. I see what you are saying. The only
19 answer I can give again is just because someone
20 has murdered one person or five people does not
21 mean that they need to die. I would at certain
22 times again be able to say yes and no; but I can
23 see myself as well, whether someone has killed
24 one person or five persons, find that there are
25 circumstances that the person should not die. I

1 don't know how else to answer that.

2 Q. Do you have any close friends who have
3 adopted children?

4 A. Adopted children? My cousin adopted
5 her children.

6 Q. How old are they now, the children?

7 A. About my children's age. I haven't
8 seen them in years.

9 Q. You don't know whether they are
10 adjusting or having problems with them?

11 A. No. I think they have pretty well
12 adjusted.

13 Q. How is Clear Lake High School for the
14 kids?

15 A. Excellent.

16 MR. STAFFORD: I have no other
17 questions.

18 THE COURT: If you would, just stand
19 outside this door for a few minutes. We will
20 be back with you.

21 (The prospective juror leaves the
22 courtroom).

23 MR. STAFFORD: I challenge for cause
24 basically on the ground of the motion which I
25 have on file attacking the constitutionality of

1 the statute. This prospective juror was unable
2 to articulate to aid me to decide whether to
3 exercise a peremptory challenge. Because of the
4 defect in the statute, this juror can not think
5 of any mitigating factors other than she has no
6 disagreement with the one you had. She
7 expressly said, in essence, what I am saying
8 that jurors are going to be there unbridled to
9 use their discretion in any way of what they
10 want to determine mitigating factors. And as
11 our great court here just last week stated, the
12 Texas Court of Criminal Appeals stated that if
13 discretion in the assessment of punishment under
14 the statutes be shown to be reasonable to
15 control rather than conspicuous and
16 discriminatory then the test of Furman is met.
17 I think from what this prospective juror has
18 said on the record everything is going to be
19 left up to her to determine what is reasonable,
20 and nothing is controlled and nothing will guide
21 the prospective jurors as to what is mitigating
22 and what is aggravating. And based upon that, I
23 would challenge this prospective juror for cause
24 because of her inability to aid me and to
25 exercise my sixth amendment right to effective

1 assistance of counsel to make effective
2 peremptory challenges whether or not to accept
3 her or to reject her.

4 THE COURT: I don't know what to say
5 other than our statutes still do not identify or
6 limit the aspects of the defendant's character
7 and record and the circumstances of the crime
8 that are mitigating, and the law does not impose
9 a formula how much weight a mitigating
10 circumstance deserves and that each juror is the
11 sole judge of whether mitigating circumstances
12 exist and if they do exist how much they
13 deserve. Your challenge is denied.

14 MR. STAFFORD: I would like to add to
15 that motion also, she would expect me to
16 convince her that there was sufficient
17 mitigating evidence. Based upon that
18 combination, judge, is my challenge.

19 THE COURT: What says the State as to
20 prospective juror number seven on panel two, Ms.
21 Jones?

22 MS. DAVIES: You are asking me?

23 THE COURT: Do you accept her?

24 MS. DAVIES: I accept Ms. Jones.

25 MR. STAFFORD: Based upon my

1 challenge, I exercise a strike, Your Honor.
2 Without waiving my right to my challenge.

3 THE COURT: Defense strike number one
4 is Ms. Jones, prospective juror number seven on
5 panel two.

6 MR. STAFFORD: Because the system or
7 statute will not assure the sentence of death
8 will not be wantonly over-imposed.

9 THE COURT: Is there your Furman
10 objection?

11 MR. STAFFORD: Therefore, it violates
12 the constitution.

13 MS. DAVIES: Untimely objection.

14 NEAL PRIDDY,
15 called as a prospective juror, was examined as
16 follows:

17 EXAMINATION BY THE COURT.

18 Q. This is prospective juror number nine
19 on panel number two, Mr. Neal Priddy.

20 Mr. Priddy, I am going to go through
21 this questionnaire for a minute or two.

22 A. Okay.

23 Q. Your work address is in Corpus?

24 A. We also have a yard here.

25 Q. So you live here?

1 A. I am leased on to a company that is
2 out of Corpus, yes, sir.

3 Q. About fifteen years ago, you did serve
4 on a jury here in Harris County?

5 A. Fifteen or a little bit longer. I
6 served for a couple of days.

7 Q. That was here in Houston?

8 A. Yes, sir. It was a correctional
9 facility incident. It happened in a
10 correctional facility.

11 Q. Pages eight and nine of this long form
12 questionnaire list statements and either have
13 you check the statement which best summarizes
14 your general views about capital punishment and
15 the death penalty or asks you to either agree or
16 disagree with the statement, and in summary it
17 appears you wish capital punishment weren't
18 necessary but believe it is necessary for some
19 offenses; is that correct?

20 A. That is correct.

21 Q. At any rate, any decision on whether
22 to assess the death penalty would depend on the
23 facts and circumstances of the individual case?

24 A. That is correct.

25 Q. You did agree, when you filled this

1 out on Monday morning, that capital punishment
2 is justified only for premeditated murder. Of
3 course, you filled this out long before we ever
4 talked to you and gave you some guidelines as to
5 the general principles that were going to be
6 applied in this case. You understand now that
7 premeditation doesn't have anything to do with
8 this?

9 A. Yes.

10 Q. Having served on a jury in the past,
11 some of the information we spoke of on Monday
12 you had heard before, but I am going to go back
13 through a few things. You are familiar with the
14 presumption of innocence. A defendant is
15 presumed innocent in a criminal case. Do you
16 agree with that presumption?

17 A. Yes, sir.

18 Q. The burden of proof is always on the
19 State, and their burden is to prove a
20 defendant's guilt beyond a reasonable doubt.

21 A. Correct.

22 Q. Do you agree with that?

23 A. Yes.

24 Q. If a defendant should not take the
25 stand in his own behalf, you cannot use that as

1 any evidence whatsoever.

2 A. That's right.

3 Q. And the indictment in a criminal case
4 is no evidence of guilt either. Do you agree?

5 A. Yes.

6 Q. Before you came in here on Monday, did
7 you realize the distinction between murder and
8 capital murder?

9 A. I knew what capital murder was.

10 Q. In terms of what the penalty was?

11 A. Right.

12 Q. You understand that when somebody
13 commits the offense of murder, a first degree
14 felony, we are talking about someone who
15 intentionally or knowingly causes the death of
16 another individual. When we are talking about
17 capital murder we are talking about someone
18 intentionally taking the life plus there is some
19 other aggravating factor. It's murder plus to
20 make it a capital murder offense. I discussed
21 with you briefly the six different statutory
22 schemes in Texas under which we have the capital
23 murder offense. One, of course, is where
24 someone murders a peace officer or fireman
25 acting in the lawful discharge of an official

1 duty. One is where someone commits a murder for
2 hire. One is where somebody commits murder
3 while escaping or attempting to escape from a
4 penal institution. One is where somebody
5 murders an employee of a penal institution while
6 incarcerated. The most common kind of capital
7 murder offense we see is where someone is in the
8 course of committing another felony offense and
9 commits a murder such as kidnapping, burglary,
10 robbery, aggravated sexual assault, arson. The
11 examples I gave this panel of a woman would be
12 kidnapped from a parking lot, raped, murdered.
13 That is a capital murder offense. If a
14 convenient store is robbed and the robber, the
15 gunman, shoots and kills the clerk in the course
16 of committing robbery, that is a capital murder
17 situation. The category, however, that we are
18 talking about in this case is where somebody is
19 alleged to have committed murder of more than
20 one person in the same criminal transaction. It
21 could be a number of people. It could be as few
22 as two people. Having read the indictment to
23 you yesterday, the allegation in this case is
24 that two people were killed in the same criminal
25 transaction. Two people were murdered in the

1 same criminal transaction. I had spoken to you
2 briefly about the possibility that you might
3 receive a charge on what we refer to as lesser
4 included offenses. If raised by the evidence, I
5 would perhaps give you a choice of different
6 kinds of offenses that a defendant might have
7 committed. If you cannot reach an agreement on
8 the capital murder offense, for example, you
9 might next consider the offense committed was
10 one of those lessers. We know that lesser
11 included offenses of capital murder might
12 include everything from first degree felony
13 murder to voluntary manslaughter to involuntary
14 manslaughter, negligent homicide, stair-stepping
15 down the scale of felonies and misdemeanors. I
16 don't know in advance of trial exactly what kind
17 of evidence you are going to hear. If a jury
18 finds a defendant guilty of the offense of
19 capital murder, it's mandatory that he either
20 receive a death penalty sentence or life
21 sentence. Did you understand that, sir?

22 A. Yes, sir.

23 Q. Did you also understand that the jury
24 does not go back and vote life or death; they
25 answer certain questions or what we refer to as

1 special issues, and that determines what penalty
2 I am going to assess?

3 A. Right.

4 Q. We insulate the jury, and in some
5 respects we insulate the judge by having the
6 jury answer those questions. The jury getting
7 to know full well what result is going to occur
8 if they answer those questions a certain way.

9 I had talked to you about the two
10 stages of trial. I don't recall in the other
11 case in which you sat did you decide punishment
12 in that case also?

13 A. No, there wasn't enough evidence that
14 come up against him. It happened inside a
15 correction facility, the people that was already
16 in there, and it was a sex act, but they didn't
17 have enough evidence to charge the man anything
18 extra.

19 Q. Did you have other inmates testify?

20 A. They did.

21 Q. So you were able to judge the
22 credibility of the other witnesses who were
23 called to testify?

24 A. Right. And they didn't -- they more
25 or less what I call ride the middle of the

1 road. It didn't go.

2 Q. They didn't prove to your satisfaction
3 beyond a reasonable doubt that the defendant
4 committed the offense.

5 A. We all twelve agreed that it wasn't
6 enough evidence.

7 Q. So you have been through that process
8 before. What you haven't seen occur is the
9 second stage of trial. If a jury finds a
10 defendant guilty of an offense, there is a
11 second stage in which additional testimony may
12 be presented. Neither side has to present any
13 witnesses or present any evidence, but they may,
14 they have the opportunity to present additional
15 evidence. That may be the stage of trial where
16 you would get evidence of a defendant's
17 background or his reputation or other bad acts
18 or previous convictions of a defendant, that
19 kind of thing. And generally when jurors are
20 deciding what the appropriate penalty is they
21 need that kind of information even though they
22 have already found somebody guilty of an
23 offense.

24 Number one of these two issues if you
25 find somebody guilty of capital murder and after

1 that second stage of trial, the first question
2 asks: Do you find from the evidence beyond a
3 reasonable doubt that there is a probability
4 that the defendant would commit criminal acts of
5 violence that would constitute a continuing
6 threat to society. That is asking the jury
7 basically to make a determination of a
8 defendant's future dangerousness. Focusing on
9 that word probability, which in common usage
10 would mean more likely to occur than not. Is
11 it more likely to occur than not, based on what
12 you have heard so far, that the defendant would
13 commit criminal acts of violence that would
14 constitute a continuing threat to society. I
15 would give the jury an additional instruction
16 that they are to consider all evidence admitted
17 at the guilt or innocence stage and at the
18 punishment stage including evidence of the
19 defendant's background or character and the
20 circumstances of the offense that militate for
21 or mitigate against the imposition of the death
22 penalty. And we ask the jury to answer that
23 question yes or no. It takes all twelve jurors
24 agreeing before they can return a yes answer.
25 It takes at least ten jurors agreeing to return

1 a no answer to that question. If the jury
2 answers no, saying there is no probability, that
3 is the end of it, I assess life imprisonment.
4 If the jury answers yes that there is a
5 probability that defendant would commit criminal
6 acts of violence constituting a continuing
7 threat to society, then the jury moves onto
8 issue number two. Both of these talk about
9 mitigating evidence. And number two asks
10 whether, taking into consideration all the
11 evidence, including the circumstances of the
12 offense, the defendant's character and
13 background and the personal moral culpability of
14 the defendant, there is sufficient mitigating
15 circumstance or circumstances to warrant a
16 sentence of life imprisonment rather than a
17 death sentence be imposed. I would instruct the
18 jurors that they are to consider mitigating
19 evidence to be evidence that a juror might
20 regard as reducing a defendant's moral
21 blameworthiness. Now, there you take into
22 consideration everything you had heard, once
23 again, even though you had already found there
24 was a probability that the defendant would
25 commit criminal acts of violence that would

1 constitute a continuing threat to society, based
2 on everything you have heard and looking at
3 those mitigating circumstances, we are asking
4 whether or not you think life imprisonment
5 should be the punishment rather than a death
6 sentence. It takes all twelve jurors agreeing
7 to return a no answer. It takes at least ten
8 agreeing for a yes answer to be returned. So if
9 the jury had returned a yes to number one and
10 yes to number two, I assess life imprisonment.
11 Only if the jury answers number one yes and
12 number two no do I assess the death penalty.
13 You get to know that in advance. A yes to one
14 and no to number two is the only way in which a
15 death penalty sentence is assessed by me. When
16 we are talking about mitigating evidence, we are
17 talking about any evidence that is relevant to
18 the defendant's character or record or the
19 circumstances of the offense which might serve
20 as a basis for a sentence less than death. We
21 know that mitigating evidence can be certain
22 kinds of things. We know that mental
23 retardation and mental illness can be mitigating
24 evidence. Other evidence a jury might consider
25 would include such things as child abuse, a

1 defendant's good behavior in prison or in jail,
2 an exceptionally unhappy or unstable childhood,
3 childhood drug abuse, economic deprivation, a
4 defendant's youth, his age, voluntary
5 intoxication, drug dependency, illiteracy,
6 opinion testimony of lay witnesses or
7 psychiatric opinion testimony that a defendant
8 would not be a danger in the future. Those are
9 all things that might be included. You might
10 have a laundry list that is ten miles long of
11 what might be mitigating evidence in the case.
12 Our statutes do not set out, do not identify or
13 limit the aspects of the defendant's character
14 and record or the circumstances of the crime
15 that are mitigating. And, in addition, the law
16 does not impose a formula for determining how
17 much weight a mitigating circumstance deserves.
18 Each juror judges that. The jury is the sole
19 judge of whether mitigating circumstances exist
20 and if they do exist how much weight they
21 deserve. It's for the jury to decide. And I
22 can't even begin to tell you how many different
23 things might be considered by a jury. What is
24 important, among other things, is you may get
25 these from a number of different sources. You

1 might determine certain things are mitigating
2 which come in the State's case in chief. You
3 might find that the defense would present
4 certain aspects of mitigation. You might
5 anticipate such things, but you cannot require
6 either side to present that kind of evidence.
7 You will note that number two doesn't place a
8 burden. There is no burden on the defense or
9 on the State to produce mitigating evidence,
10 mitigating circumstances. There is no burden
11 placed on the defense or State as to proof
12 beyond a reasonable doubt or anything like
13 that. Number one does have that proof beyond a
14 reasonable doubt. And when you're answering
15 the question of guilt, that is also proof beyond
16 a reasonable doubt. Number two, it seems to me,
17 is basically asking you, once you have found a
18 defendant guilty of capital murder and once you
19 have found that there is a probability that he
20 is going to commit criminal acts of violence
21 that would constitute a continuing threat to
22 society, is there still something there in all
23 that you have heard that says to you that life
24 imprisonment sentence would be warranted.
25 Gives the jury another way to let me know that

1 life rather than death is the appropriate
2 punishment.

3 A. Uh-huh.

4 Q. Do you have any questions about those?

5 A. No, sir. I believe I understand them.

6 Q. Do you see how the answer to number
7 one can be yes under some circumstances and no
8 under some circumstances depending on what you
9 had before you even though you found someone
10 guilty of the offense of capital murder?

11 A. Yes, sir.

12 Q. And if you had found somebody guilty
13 of capital murder and answered number one yes,
14 do you also see that number two could sometimes
15 be yes and sometimes could be no?

16 A. Yes, sir.

17 Q. I am basically asking you to agree
18 that the answers aren't automatically yes or no.

19 A. Correct.

20 Q. We want to make sure you are not
21 predisposed to always answer a certain way so as
22 to insure that a death penalty results or to
23 assure that a life sentence results. Do you
24 understand?

25 A. Yes.

1 Q. Is there anything about your views
2 regarding capital punishment and the death
3 penalty which would prevent or substantially
4 impair the performance of your duties as a juror
5 in accordance with the instructions I would give
6 you and your oath as a juror?

7 A. No, sir. I would try to do it the
8 best of my ability, to take in all the
9 considerations.

10 THE COURT: Ms. Davies.

11

12 EXAMINATION BY THE STATE
13 BY MS. DAVIES:

14 Q. Hello, Mr. Priddy. We talked a lot on
15 Monday when you were in here, and I didn't
16 really get a chance to hear much from you about
17 how you feel about things, so that is the main
18 thing we are interested in today is not trying
19 to get you to -- we don't want you to answer
20 just the way you think we want you to.

21 A. Correct.

22 Q. But to tell us how you feel and what
23 you believe. I am interested to know what your
24 initial gut reaction was when you realized that
25 this jury service was going to involve a case

1 that might have the death penalty?

2 A. Well, when they first give us those
3 forms and we started filling it out and it asked
4 about capital punishment and stuff, I realized
5 at that point that we must be involved in
6 something, you know, besides just regular jury
7 duty.

8 Q. The questionnaire was pretty much a
9 give away; wasn't it?

10 A. Yes.

11 Q. What was your feeling?

12 A. Well, I know when you take on this
13 type of responsibility that, you know, it's a
14 great responsibility for us to hear all the
15 evidence and everything because it doesn't go
16 any higher, you know, capital punishment is the
17 highest. And we have to take this very
18 conscientiously.

19 Q. Did you give it some thought after you
20 left here yesterday?

21 A. Oh, I am sure, yes, definitely, it
22 weighed heavy on your mind because of capital
23 punishment, the importance of it.

24 Q. You know, in a way it may not seem
25 quite fair. We give you the questionnaire to

1 fill out before you have heard anything about
2 the case. The reason is we want to get those
3 first reactions.

4 A. Correct.

5 Q. Sometimes I think what we ought to do
6 is let you fill it out over there, then, when
7 you come back today fill it out again and see,
8 after you have had some twenty-four hours to
9 give it some thought, if you would answer
10 anything any differently.

11 A. Differently, yeah.

12 Q. As you were thinking about it, since
13 you first came down here, can you share with us
14 a little bit what your thoughts have been about
15 that? Maybe whether you think you really
16 believe as strongly in the death penalty as you
17 first indicated you do?

18 A. I don't believe that I have changed
19 any opinion the way that I feel about the death
20 penalty. It's just like any time that you talk
21 about the death penalty, anything, the
22 importance of it. But as far as changing from
23 yesterday from my views, you know, when I filled
24 out the questionnaire, I don't have any kind of
25 change in my answers.

1 Q. Do you believe the death penalty is
2 necessary in some cases?

3 A. I do believe it's necessary. I wish
4 it wasn't. I believe I stated that in part of
5 mine, but I believe it is necessary.

6 Q. Have you always held that view, or
7 have you changed over time?

8 A. I am sure I have changed over time.
9 Probably when I was younger I questioned it
10 quite a bit.

11 Q. When you say you questioned it quite a
12 bit, do you remember--

13 A. I mean, I just, when I was younger, I
14 really thought it was probably a cruel way, you
15 know. I know if a person is taken to get the
16 capital punishment they have done terrible
17 because they have taken a person's life or
18 whatever it is, but if our system didn't take
19 care of this I believe the world would get out
20 of balance. In other words, if they was no
21 capital punishment for anyone, then I think we
22 or society would -- I don't know the word I
23 want to use -- it would run wild wouldn't
24 necessarily be the proper word to use. It would
25 get out of hand I think, our society.

1 Q. The judge has already gone over the
2 kinds of offenses that are included as capital
3 murder offenses. If you were going to write the
4 law, if you were going to make a list of those
5 cases that you think the death penalty should be
6 available for, would you include murder during
7 the course of a robbery or murder during the
8 course of a burglary?

9 A. Another thing -- well, another thing
10 that I would add to like capital murder is also
11 like infants or children or anything of that
12 nature that they take their lives, a child
13 doesn't have any way to protect their self or
14 anything, and I think this is a capital offense.

15 Q. A lot of people would agree with you
16 on that. What about some of the ones like
17 murder during the course of a robbery, murder
18 during the course of a burglary, would you also
19 include that?

20 A. Well, I think it depends upon how
21 cruel or how it was done, you know. I am sure
22 a lot of times when a robbery takes place there
23 is no intent to kill, but then it happens. And
24 I am wondering if, say, for instance, if they
25 kidnap say the person they was robbing and they

1 tortured this person to a great extent or how
2 they mutilated that person or something, I
3 believe it would be a capital murder. I do.

4 Q. What about if they just go in to rob a
5 store? Typical thing you read about in the
6 newspaper, the convenient store robbery.

7 A. Yes.

8 Q. They go in to rob and blow the clerk
9 away. Is that the kind of offense that you
10 think should be -- I am not saying would that
11 person always get the death penalty, but is that
12 the kind of case that in some instances should?

13 A. I think it would. I really do. If
14 they went in there, I am sure it depends on the
15 individual person, too, you know, and how they
16 acted toward it or what provoked them or
17 something.

18 Q. Well, let's talk about that a little
19 bit because, any time you are talking about any
20 kind of murder, self-defense is something that
21 might come up. Do you feel like people have the
22 right to defend themselves?

23 A. Definitely.

24 Q. The law does include the right to
25 self-defense. A person has the right to defend

1 themselves. They have the right to defend
2 someone else against the threat. For instance,
3 we were talking about a convenient store robbery
4 that resulted in a murder. You know, if
5 somebody goes into a convenient store to rob
6 somebody, goes into the clerk, maybe has a gun,
7 says give me your money. He doesn't intend to
8 kill anybody when he walked in, but he has a gun
9 to show the clerk. Says give me your money.
10 The clerk pulls a gun from under the counter and
11 says: No, drop your gun. And then the robber
12 shoots the clerk, then comes into court and
13 says: Well, I had to defend myself, the clerk
14 pulled a gun.

15 A. Yeah, but he went in there with a
16 gun. The intent to rob, he may not have gone in
17 there with the intent to kill, but the
18 circumstances come up that he did kill.

19 Q. Okay. Well, the point is the right of
20 self-defense would not be the robber's; it would
21 be the clerk's.

22 A. That's right.

23 Q. Okay.

24 A. Has to defend himself.

25 Q. So you feel people do have the right

1 to defend themselves in their homes or their
2 stores or wherever?

3 A. Definitely, I do.

4 Q. You mentioned something about intent.
5 You said you he didn't go in there with the
6 intent to kill. I think we touched on this
7 yesterday. The law does not say that it has to
8 be premeditated murder but just an intentional
9 murder.

10 A. Uh-huh.

11 Q. I suggest that that intent can be
12 formed very quickly. You can make the decision
13 that you are going to do something in a split
14 second, even if it's a decision to kill. Do you
15 disagree with that or agree?

16 A. No, I agree with that. He may have
17 gone in there with the intention of just robbing
18 but he went in there no matter what it took
19 maybe he was going to get the money.

20 Q. Uh-huh. Does a murder seem less
21 serious to you if it's intentional but kind of a
22 spur of the moment decision as opposed to one
23 that was planned ahead?

24 A. Right, because premeditated I think
25 carries a greater weight.

1 Q. Okay. You would count the spur of the
2 moment intentional killing as a little less
3 serious somehow?

4 A. Yes, unless it got completely, you
5 know, out of hand or.

6 Q. I am not sure what you mean when you
7 say out of hand?

8 A. Say if the person was going to defend
9 hisself and this other guy, the one that come in
10 to rob, say he started to shooting, just, you
11 know, it may be more than one person in the
12 store. He is determined he is going to get the
13 money no matter what it takes. And I think you
14 have to consider this evidence towards whether
15 it was capital murder or not.

16 Q. Whether it was more brutal?

17 A. Right. And then another case in that,
18 say, for instance, some stores, you know, you
19 have a detective and things, and there has been
20 times where a person will go in and they will
21 shoot the detective and never say anything to
22 him that it's going to be a holdup. They see
23 that it's something going to stand between them
24 and the money. And they will shoot the person
25 that is a guard in the store or whatever. This

1 has happened a number of times. I think this
2 warrants capital murder.

3 Q. The kind of person who is just bent on
4 violence even if it's not necessary?

5 A. Right. Then, too, then when you get
6 down into the case on that, it may be the guy
7 may be mentally off or something. But, I mean,
8 I am talking about if the person is not, you
9 know, we don't have other evidence to bring up
10 against this. I am talking about a person that
11 should be of sound mind that does this.

12 Q. What about the situation where two
13 people are killed in the course of the same
14 criminal transaction, is that the kind of case
15 that you think should be included for the death
16 penalty in some instances?

17 A. Yes, in some instances, yes.

18 Q. I didn't mean to cut you off. I
19 thought maybe you were starting to say
20 something.

21 A. No.

22 Q. I know that you mentioned on your
23 questionnaire that one of the primary objectives
24 of punishment should be rehabilitation. Do you
25 feel like everybody can be rehabilitated?

1 A. I don't believe they can, but I think
2 we ought to give it our best effort and try to.

3 Q. What about, I mean, would it make a
4 difference to you in deciding on the death
5 penalty whether someone had been to the
6 penitentiary before? In other words, do you
7 have any feelings about whether everybody should
8 get a second chance or third chance or that kind
9 of thing?

10 A. If someone has been in prison and they
11 was out, I think that you have to weigh this,
12 what kind of murder taking place and everything,
13 you know, what did they do. Did they try to
14 rehabilitate the person who was in prison before
15 they released it, or is it like some of the acts
16 we hear now, it's just a revolving door, a
17 person is put in prison and he is released
18 within just a few months for a crime that he
19 should be in there for a number of years. I do
20 have a problem with that.

21 Q. I think we mentioned that on Monday
22 also. The judge is going to tell you, that even
23 though you may not like what you read and hear
24 about that, he is going to instruct you that you
25 cannot consider parole.

1 A. Right.

2 Q. In reaching a verdict. Do you feel
3 like you would be able to follow that
4 instruction?

5 A. Yes, I do. I am sure that like when
6 a case comes up you have to consider the case
7 that is in front of you at the time. Where the
8 other evidence will come in is where the judge
9 is giving the sentence to the person that
10 committed this. If we find the person guilty,
11 then this other will come into the act, you
12 know, probably how severe the punishment will
13 be.

14 Q. You have been in your present business
15 for how long?

16 A. If you want to back up a little bit.
17 I worked for Weingarten's for twenty-nine and a
18 half years. If you noticed on the application,
19 I show two months for a company. And then I
20 worked Weingarten's until they went out of
21 business in '84. I was accountant with them.
22 Prior to that, I worked in the stores. Then in
23 '85, I went in business, you can really say I
24 went in business for myself. I am leased to a
25 company. And that company went down the tubes

1 this past, well, this past March, and I joined
2 this other company because our salesmen moved
3 over to this company I am with now. I have only
4 been leased to them for two months.

5 Q. Well--

6 A. But I have never quit a job. Jobs
7 have run out.

8 Q. I understand. That is happening to a
9 lot of people these days.

10 A. Right. I thought mine was secure at
11 Weingarten's until the holding company put us
12 under. I only had twenty-nine and a half total
13 years.

14 Q. So, then, this company that went under
15 a couple of months ago, what were you doing for
16 them?

17 A. I was same thing that I am doing now
18 because we still have our same salesmen, they
19 just moved over. It's oilfield related
20 equipment. I hotshot oilfield equipment. I've
21 been to thirty-one states, but mostly we run
22 Texas, Louisiana, and Oklahoma, but I have been
23 to thirty-one states, and I have been doing it
24 since '85.

25 Q. You have been living here in Harris

1 County for a good while?

2 A. I have lived here since '65 other than
3 two years I lived up at New Caney in Montgomery
4 County. Which I showed I lived here thirteen
5 years, but I have really lived here other than
6 '65 other than two years in New Caney.

7 MS. DAVIES: Your Honor, could we have
8 just one moment to address the court?

9 THE COURT: Could you step out this
10 door right here?

11 THE JUROR: Sure.

12 (The prospective juror leaves the
13 courtroom).

14 MS. DAVIES: It is my understanding we
15 have an agreement.

16 THE COURT: It's my understanding that
17 by agreement of all parties prospective juror
18 number nine on panel two, Mr. Neal Priddy, is
19 being excused.

20 Is this your agreement, Ms. Davies?

21 MS. DAVIES: It is.

22 THE COURT: Yours, Mr. Stafford?

23 MR. STAFFORD: Yes, sir.

24 THE COURT: Yours, Mr. Rhoades?

25 THE DEFENDANT: Yes.

1 JAMES PATRICK GAFFNEY,
2 called as a prospective juror, was examined as
3 follows:

4 EXAMINATION BY THE COURT.

5 Q. This is prospective juror number nine
6 on panel number two.

7 MS. DAVIES: I believe it's number
8 ten.

9 THE COURT: I'm sorry. Have a seat.
10 Prospective juror number ten on panel number
11 two, Mr. James P. Gaffney.

12 A. Right.

13 Q. Broker sales in what?

14 A. Insurance.

15 Q. Okay. Where did you go to college?

16 A. University of North Carolina, Chapel
17 Hill, North Carolina.

18 Q. Your daughter who is a therapist, is
19 she here in Houston?

20 A. No, San Antonio.

21 Q. What kind of therapist?

22 A. Cancer treatment. She works between
23 the terminally ill cancer people and the
24 families.

25 Q. What does your son do at Chevron?

1 A. He works in the accounts payable
2 department.

3 Q. Two years ago you were on a criminal
4 jury. I don't remember. Did you tell me what
5 court you were in? Do you remember what court?

6 A. It was the judge right around the
7 corner here on the seventh floor. McSpadden.

8 Q. You did reach a verdict and you did
9 participate in the punishment phase?

10 A. That is correct.

11 MR. STAFFORD: He is the prospective
12 juror that we visited with we asked him not to
13 divulge what problems he was having back in the
14 jury room. Could you explore that with him
15 where something occurred.

16 THE COURT: I don't remember you being
17 that person because on your questionnaire on
18 page five asked whether there was anything in
19 your prior jury experience that either upset or
20 agitated you. You answered no.

21 A. Well, agitation or upset wouldn't be
22 the word.

23 Q. Tell me what you were.

24 A. The judge called us back into his
25 chambers and thanked us.

1 Q. Somebody gave you some additional
2 information you wish you had known?

3 A. Well, it wasn't so much I wish I had
4 known. It was just the times that we have here
5 in Houston, we're constantly reading in the
6 paper about the overcrowding of the jails and
7 the length of time that is being served and that
8 type of thing. And we were curious. We wound
9 up with a 77 year sentence is what we got. How
10 we arrived at that number was mind boggling.
11 One of the questions we had of the judge, when
12 we got back there, he said feel free to ask
13 anything, the case is now over and everything.
14 And I said I am curious what would be the
15 minimum amount of time somebody getting 77 years
16 could serve in this state with all the problems
17 we are having now, with overcrowding jails and
18 everything else, and he said to me: Well, you
19 know, he says tough question, but good behavior,
20 he could get out in a very short period of time
21 with the situation we have here in the state. I
22 said, "Like four or five, six years?" He said
23 that would be possible. I remember thinking
24 that, you know.

25 Q. Wait a minute. I want to catch a

1 couple of things here. The person was tried for
2 aggravated robbery?

3 A. That is correct.

4 Q. Was this a holdup with a gun?

5 A. Yeah, it was a jewelry store.

6 Q. So there was a deadly weapon involved?

7 A. Yes.

8 Q. Was it a fairly recent case, like one
9 that happened within the last year or two of the
10 time that you tried the case?

11 A. I believe so. I believe the incident
12 took place probably in less time than a year
13 time.

14 Q. I'm not saying that judge gave you
15 some incorrect information, but it doesn't sound
16 right from what you have told us.

17 A. Well, I remember the feeling I had
18 because when the sentencing part came, you are
19 then, of course, made aware of any past
20 experiences that the defendant had.

21 Q. He had previous felony convictions?

22 A. A sheet a mile long.

23 Q. And, so, y'all were assessing
24 punishment between 25 years or 99 years or life?

25 A. Right.

1 Q. Something doesn't sound exactly right
2 if there was a deadly weapon involved.

3 A. It has been sometime ago. I can't
4 quote exactly everything that happened. I just
5 remember the feeling that I had of: Gosh, we
6 did an awful lot of work here, it wound up
7 taking a lot longer than I thought. It was
8 about five days. I thought when we first went
9 in there it would be a real quick case. It was
10 eyewitnesses. They had like five people in the
11 store that ID'd the individual. It's like: The
12 person here, yes, that is him, that type of
13 thing. I remember in the beginning of the
14 trial I thought this is probably going to be,
15 you know, fairly quick because of eyewitnesses.
16 Turned out to be about five days. A big problem,
17 I wound up in the jury situation, we had, I
18 think we had twelve people, and eleven were for
19 conviction and one was against. The judge said
20 we are not going to -- we are not going to let
21 you go until you reach a verdict here.
22 Basically we had to keep at it.

23 Q. You understand the case that we are
24 trying is capital murder offense and a term of
25 years doesn't apply if somebody is convicted of

1 capital murder, it's either life or death?

2 A. You made that pretty clear yesterday.

3 Q. If somebody is convicted of a lesser
4 offense, the State doesn't prove the defendant's
5 guilt beyond a reasonable doubt of the offense
6 of capital murder, they might prove something
7 else, at which time there would be a second
8 stage where the jury determines what the
9 appropriate punishment would be. At that point
10 you would be charged, as I'm sure you were in
11 the case a couple of years ago, that you are not
12 to discuss among yourselves how long the accused
13 would be required to serve any sentence
14 imposed. We can't ask the jurors to flush from
15 their mind the information they have when they
16 come into the courtroom and hear a case and go
17 back to deliberate a case. We are also well
18 aware that jurors often have a lot of
19 misinformation. Which you may or may not have
20 some misinformation. I am not sure. At any
21 rate, you would be instructed that you are not
22 to discuss how long somebody would actually have
23 to serve because, as we have already said, those
24 matters come within the exclusive jurisdiction
25 of the board of pardons and paroles and the

1 governor and are not to be considered by the
2 jury.

3 The only person you've ever known who
4 has been to prison is the guy that was convicted
5 at your last trial; right?

6 A. Pretty much that is correct.

7 Q. Pages eight and nine of the
8 questionnaire either ask you to check the
9 statement which best summarizes your views about
10 capital punishment or the death penalty and ask
11 you to agree or disagree with the statement.
12 There was one little conflict. On one page you
13 had checked that you were in favor of capital
14 punishment except in a few cases where it may
15 not be appropriate. And by in favor of capital
16 punishment I am never sure if that question
17 means when somebody is convicted of capital
18 murder offense you are in favor of it either
19 being life or death or if that is referring only
20 to the death penalty because the next page you
21 said, in summary, it looks like you don't
22 necessarily believe in capital punishment, you
23 wish it weren't necessary but you believe it is
24 necessary for certain kinds of offenses.

25 A. I think that is exactly how I feel.

1 Q. At any rate, you had checked that your
2 decision on whether or not the death penalty
3 should be assessed would depend on the facts and
4 circumstances of the individual case; correct?

5 A. Correct.

6 Q. One of these statements which you
7 answered, which, of course, was answered before
8 you heard us talk about the offense of capital
9 murder, says capital punishment is justified
10 only for premeditated murder. You understand
11 now that premeditation is not a requirement?

12 A. Right.

13 Q. You may hear that intent can be formed
14 in an instant, which it can.

15 A. Yesterday was a learning process.

16 Q. Then we are doing it right. Sometimes
17 we wonder. Since you were on a jury just a
18 couple of years ago, you are familiar with these
19 general principles: Presumption of innocence,
20 burden of proof, if a defendant does not take
21 the stand and testify in his own behalf it can't
22 be held against him; the indictment is no
23 evidence of guilt whatsoever. Do you agree
24 with all that?

25 A. I do.

1 Q. Before you came in yesterday, did you
2 understand the distinction between murder and
3 capital murder that we were making?

4 A. No.

5 Q. When we are talking about murder we
6 are talking about somebody intentionally or
7 knowingly causing the death of another
8 individual. To elevate that first degree felony
9 offense to capital murder, we are talking about
10 the intentional taking of a life plus some
11 aggravating factor. We have those six
12 statutory schemes in Texas in which the offense
13 of murder is elevated to capital murder. One in
14 brief general terms is where somebody murders a
15 peace officer or fireman in the lawful discharge
16 of an official duty. Murder for hire kind of
17 murder. Somebody murdering someone while
18 escaping from a penitentiary or attempting to
19 escape. Someone who murders an employee in the
20 operation of the penal institution while that
21 person is incarcerated in the penal
22 institution. The most common kind of capital
23 murder situation is where somebody commits a
24 murder in the course of committing or attempting
25 to commit another felony, as kidnapping,

1 burglary, robbery, aggravated sexual assault,
2 arson. The examples I had given were one where
3 a woman is kidnapped from a parking lot, taken
4 somewhere, raped and murdered, capital murder.
5 Another would be where a person is in the
6 process of committing robbery of a convenient
7 store and murders the clerk, that is capital
8 murder. Murder plus the aggravating factor.
9 And the final kind of statutory scheme we have
10 is where someone murders more than one person in
11 the same criminal transaction, multi murders.
12 Could be a number of murders; could be as few as
13 two. Having read the indictment to you
14 yesterday, you know that the allegation in this
15 case is two people having been killed, that
16 somebody murdered two people during the same
17 criminal transaction.

18 Do you agree that those kinds of
19 different schemes of having an intentional
20 killing with the aggravating factor are the
21 kinds of offenses which should warrant
22 punishments of either life or death on
23 conviction?

24 A. Well, you brought up a term yesterday,
25 mitigating.

1 Q. Okay.

2 A. I think that would bear weight.

3 Q. But, I mean, bear with me just a
4 second. There are just two possible
5 punishments, life or death.

6 A. I understand.

7 Q. Would you agree these are the kinds of
8 offenses that should be capital offenses?

9 A. Yes, sir.

10 Q. You understand it. You have been
11 through that process with the two separate
12 stages of trial. In the case in which you were
13 involved in, once the jury returned a verdict of
14 guilty, was additional evidence presented in
15 addition to the prior convictions of the
16 defendant?

17 A. No, pretty much the prior
18 convictions. That I remember being the main
19 thrust of the additional.

20 Q. Pretty much one sided, from the state
21 in that case?

22 A. From the state side, yeah, the state
23 presented his record, basically.

24 Q. You understand neither side is
25 compelled to present anything? Either side may

1 have the opportunity to present additional
2 evidence but they are not compelled to do it.
3 In that second stage, that is where you get to
4 hear about the defendant's reputation, his
5 background and prior criminal record, just as
6 you heard, and you can't speculate on what that
7 might or might not be. Have to go basically on
8 what you have got in the courtroom.

9 A. Right.

10 Q. Only after hearing whatever evidence
11 there is in that regard, after having convicted
12 somebody of capital murder, do we send the jury
13 back to answer these special issues. They don't
14 vote life or death. They answer these special
15 issues. Were you familiar with these special
16 issues?

17 A. Not really.

18 Q. That is how we do it with capital
19 murder offense, insulating both the jury and the
20 court. That first one asks: Do you find from
21 the evidence beyond a reasonable doubt that
22 there is a probability that the defendant would
23 commit criminal acts of violence that would
24 constitute a continuing threat to society. That
25 is the estimation of future dangerousness

1 question. Is it more likely to occur than not
2 that the defendant on trial would commit
3 criminal acts of violence constituting a
4 continuing threat to society. That is the
5 question which takes a unanimous vote of all
6 twelve to answer it yes. Takes at least ten
7 people agreeing to answer that question no. If
8 that question is answered no, that is the end of
9 it. I assess life in prison. If that question
10 is answered yes there is indeed a probability
11 that the defendant on trial would commit
12 criminal acts of violence constituting a
13 continuing threat to society, then we ask the
14 jury to proceed to issue number two. You have
15 talked about the mitigating evidence.
16 Basically let me tell you something else about
17 number one. When you are determining this
18 probability question, this question of future
19 dangerousness, I would instruct the jury that
20 the jury is to consider all the evidence
21 admitted at the guilt or innocence stage and the
22 punishment stage including evidence of a
23 defendant's background or character or the
24 circumstances of the offense that militates for
25 or mitigates against the imposition of the death

1 penalty. Consider all that when you're
2 answering that probability question. Then at
3 issue number two you see where mitigating
4 circumstances are directly referred to in issue
5 number two. You would only consider number two
6 if you answer number one yes. Issue number two
7 is asking whether, taking into consideration all
8 the evidence, including the circumstances of the
9 offense, the defendant's character and
10 background, personal moral culpability of the
11 defendant, there is a sufficient mitigating
12 circumstance or circumstances to warrant that a
13 sentence of life imprisonment rather than a
14 death penalty can be imposed. You get to
15 consider everything you have heard so far in
16 trial. First stage of trial, second stage of
17 trial. You get this so-called mitigating
18 evidence, mitigating circumstances that you may
19 have before you. What are those? Those are
20 just about anything that is relevant to a jury
21 and serve as some kind of basis for a sentence
22 less than death. Evidence relative to the
23 defendant's character, his record, the
24 circumstances of the offense, anything which
25 would serve for a life sentence rather than the

1 death penalty. You cannot require either of
2 these parties to present evidence of mitigating
3 circumstances. You may well get mitigating
4 evidence from either side or both sides. May
5 come in the State's case; the defense may call
6 certain witnesses to the stand to present what
7 they would request that you take into
8 consideration as mitigating evidence. You might
9 anticipate certain kinds of things, but you
10 can't require it from either side. Our statutes
11 do not identify or limit the aspects of the
12 defendant's character and record or the
13 circumstances of the crime that are mitigating.
14 And the law doesn't put any formula out there so
15 you can determine how much weight any particular
16 mitigating circumstance deserves. The jurors
17 are the sole judges of whether mitigating
18 circumstances exist, and if they do exist how
19 much weight they deserve is up to the jury. We
20 know that certain things are included as
21 mitigating evidence. We know that mental
22 retardation, mental illness, for example, can be
23 mitigating circumstances. There is not an all
24 inclusive list. Your list may have a million
25 things listed on it, I don't know. Might

1 include such things as child abuse, good
2 behavior while a defendant was in jail, an
3 exceptionally unhappy and unstable childhood.
4 It might include childhood drug abuse or
5 economic deprivation, youth, the age of the
6 defendant. It might include voluntary
7 intoxication. It might include drug
8 dependency. It might include illiteracy,
9 opinion testimony of lay witnesses or
10 psychiatric testimony that a defendant would not
11 be a danger in the future. All those things
12 could be included as mitigating evidence. I
13 have no idea if any of those or none of those or
14 some brand new ones might be brought into this
15 case. But those are the kind of things you
16 might have in front of you. And number two is
17 asking you specifically, even though you find a
18 defendant guilty of capital murder, and even
19 though based on what you've heard so far you
20 believe there is a probability this defendant
21 would commit criminal acts of violence that
22 would constitute a continuing threat to society,
23 if there are still some things there for you as
24 an individual juror to say I still think life
25 imprisonment rather than the death penalty is

1 the proper punishment. Okay? Understand?

2 A. Yes.

3 Q. There is no burden of proof written in
4 issue number two.

5 A. Right.

6 Q. That kind of turns everything in the
7 jurors' laps, lets you sift through it and make
8 a determination. It requires all twelve people
9 to agree that that answer should be no; requires
10 ten or more to agree the answer should be yes.
11 If that issue is answered yes, I assess life in
12 prison. Only if number one is a unanimous yes
13 and number two is unanimous no do I assess the
14 death penalty. You as a prospective member of
15 the jury get to know that in advance. Going
16 in, you know exactly what I am going to do
17 depending on how you answer those question.
18 Having said that, we are trying to assure that a
19 juror would not always automatically answer the
20 questions one way or the other. Can you see
21 that number one could sometimes be answered yes
22 as to probability, sometimes no, depending on
23 the facts and circumstances you had before you?

24 A. Yes, sir.

25 Q. Even if you answered number one yes,

1 do you see how number two could sometimes be
2 yes, sometimes be no, depending on what you had
3 before you?

4 A. Yes.

5 Q. We want to make sure you are not
6 predisposed to always answer a certain way to
7 insure either a death penalty or life
8 sentence. Okay.

9 Is there anything about your views on
10 the death penalty or capital punishment which
11 would either prevent you or substantially impair
12 your performance or the performance of your
13 duties as a juror in accordance with the
14 instructions I would give you or your oath as a
15 juror?

16 A. No.

17 THE COURT: Ms. Davies.

18 MS. DAVIES: Thank you.

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1 VOIR DIRE EXAMINATION BY THE STATE

2 BY MS. DAVIES:

3 Q. We get to talk again, Mr. Gaffney.
4 This time we want to hear more from you although
5 you did liven things up for us yesterday. You
6 did. Often we have people come in and they sit
7 back and don't have anything to say, so it's
8 always refreshing when someone is candid about
9 telling us how they feel about things. That is
10 what we want today, too.

11 Did you think about this last night?

12 A. Sure did.

13 Q. Do you mind sharing your thoughts a
14 little bit with us?

15 A. Well, I went home, I had some
16 dinner. I have a study in the house that is
17 kind of my room. I went in there, and I
18 thought about it. I have never been involved in
19 anything like this, you know, somebody's life
20 that is at stake. It's an awesome
21 responsibility. I thought about that a lot. I
22 mean, I could sit on a jury and the outcome of
23 whether somebody lived or died would be in my
24 hands. I have just never gone through anything
25 like that. Pretty well the main theme of my

1 thinking.

2 Q. You know, sometimes it seems
3 practically unfair. We pass these
4 questionnaires out to get your impression before
5 you have been informed and before you have gone
6 through that so-called educational process.
7 Sometimes I think we should give the same
8 questionnaire to you when you come back
9 twenty-four hours later and you have had a
10 chance to think on it a little bit to see if
11 there would be a difference in your answer. Do
12 you think there would be in yours?

13 A. No. I know trying to refresh my
14 memory on the questions about them, I think the
15 judge even brought it up, I seemed to, you know,
16 have different sides on it. But I feel like
17 that is me, that is who I am. I don't think I
18 am -- I don't think it's set in concrete in my
19 mind this crime calls for this, or I think every
20 crime of any nature has, everything has to be
21 considered, everything.

22 Q. Can you tell me -- I think from the
23 questionnaire I get that you think the death
24 penalty is necessary in some cases?

25 A. In some cases, yes.

1 Q. And I know we ask them a hundred
2 different ways on the questionnaire, so I am
3 going to ask you another way. Can you just tell
4 me why you think so?

5 A. Why I think the death penalty is
6 necessary in some cases?

7 Q. Right.

8 A. I would say that when a person has
9 shown total disregard for human life and has a
10 history of violence and crime on society, I
11 think in my mind would probably be a
12 justification for the death penalty.

13 Q. When you say they have had a history,
14 would a history of criminal offenses short of
15 murder, you know, just a history of law
16 violations over time, would that be significant,
17 or would it have to be that they have killed
18 before or done particularly violent crimes?

19 A. For me, that has a lot of gray in it.
20 It really does. I don't necessarily think that
21 I could say yes to that question, if they had a
22 history of crimes other than murder would
23 definitely make me vote for the death penalty.
24 And I couldn't say that, you know, the other
25 side of that argument. I think it would just be

1 something that would have to be weighed strictly
2 on that case, period. I don't think I could go
3 -- I don't think I could be specific on your
4 question. I really don't.

5 Q. Please understand I am not asking
6 whether you would give the death penalty in this
7 case or any specific case.

8 A. I understand that.

9 Q. We can't tell you the facts, you
10 know. I certainly wouldn't ask you that kind
11 of question. In some instances we ask for the
12 death penalty based on the facts of that
13 particular case. Now, as the judge has
14 described to you, sometimes you get additional
15 information about a person's background. That
16 is not always the case. I want to focus on the
17 kind of situation where you come into court,
18 say, look, the facts of this capital murder are
19 so brutal that that alone suffices, I would
20 argue to you, to answer the questions in such a
21 way that the death penalty would result. Do you
22 think that that would be appropriate in some
23 cases, that the facts of just the capital
24 murder, no past offenses, nothing else about the
25 defendant, just the facts of the case alone

1 could be enough to convince you beyond a
2 reasonable doubt that those questions should be
3 answered, the result--

4 A. Just the facts of the cases and no
5 other information?

6 Q. Just the capital murder?

7 A. That would be enough for me to vote
8 for the death sentence?

9 Q. That is what I am asking you.

10 A. No, I don't think so.

11 Q. No matter how brutal?

12 A. Murder is brutal. There is no
13 question about that. But, in other words, if I
14 hear your question, if you came to court and
15 basically got up and said this individual
16 murdered two people brutally, you know, and that
17 is it.

18 Q. You would hear the evidence from the
19 witness stand about the details of that
20 particular capital murder, whether it was the
21 murder of two people or of twenty people.

22 A. Or whatever.

23 Q. Or whatever.

24 A. I mean, you know, again I think it
25 would be something that I would have to be there

1 and go through, you know, to answer your
2 question. I just, you know, when you first
3 paraphrased it, it sounded like just the fact
4 that the individual had murdered two people, you
5 know, they were brutal, is that sufficient to
6 warrant the death penalty. I don't think at
7 this point I could answer that question yes or
8 no for you.

9 Q. That is what I am trying to make
10 clear. You know, it's a matter -- there are a
11 lot of different kind of capital murders.

12 A. I feel right now that there would have
13 to be more for me than just that. That is my
14 first feeling. There would have to be more than
15 just that.

16 Q. Can you tell me could there be a
17 situation -- I am sure both of us, you found out
18 the other day when we use examples we come up
19 with extreme examples, but like I say, it could
20 be the murder of twenty people. It could be a
21 torture murder. Who knows. Just imagine the
22 worst one you have read about. My concern is to
23 know whether I can rely on that aspect of the
24 law that says at times, yes, that is enough, if
25 the jury is convinced that is enough, but I am

1 not, right now I am not so concerned about what
2 the law is but how you feel.

3 A. I understand.

4 Q. So I just need to know whether you
5 would always have to have more or whether there
6 may be some really horrible capital murder out
7 there that for you would be enough.

8 A. Again, I think my answer would be
9 sometimes I might have to have more and
10 sometimes I might not.

11 Q. Okay. I think that answers me. If
12 sometimes that would be enough?

13 A. It might be.

14 Q. Okay. You understand you are going
15 to find out as we talk the "might be's" always
16 makes us very nervous. I certainly am. A yes
17 or no.

18 A. I think, when it comes to taking
19 another person's life, I think I am going to
20 have to be a "might be". I don't think it's set
21 in concrete for me. I really don't. I think
22 as the judge said, made a point yesterday,
23 something like this, I mean, those issues right
24 there alone are -- that is not concrete at all
25 there, especially the numbers that have to go

1 yes, no. I think I could vote, but it would
2 depend on the case, the circumstances, the
3 evidence.

4 Q. And we have thrown out references to
5 the phrase beyond a reasonable doubt. We have
6 used repeatedly but we really haven't talked
7 about it much yet. And the standard of proof
8 is beyond a reasonable doubt. That burden of
9 proof is always on me. Defense doesn't have to
10 bring any evidence whatsoever either stage of
11 trial.

12 A. Right.

13 Q. They are under no obligation to bring
14 in any mitigating evidence. There may or may
15 not be mitigating evidence. If there is some,
16 it may very well come from the state.
17 Inadvertently, perhaps. But if there is
18 something mitigating or not, regardless, the
19 burden is always on me, the standard of proof
20 for me to prove it is beyond a reasonable
21 doubt. There is a lengthy definition of that.
22 An instruction from the court. The instruction
23 makes clear that it does not mean beyond all
24 doubt. Now, of course, I know you have been on
25 a jury before so you have had that, although I

1 don't think there was a definition given to
2 you. The laws are always changing on us. Now
3 there is a definition. But we are talking about
4 a different kind of case. We are talking about
5 the death penalty. So my concern is to know do
6 you feel that where the death penalty is
7 involved you would have to have all doubt
8 removed as opposed to--

9 A. No, I don't think I would have to have
10 all.

11 Q. You feel like the beyond a reasonable
12 doubt would be an appropriate standard for you?

13 A. I do.

14 Q. I am not trying to minimize the
15 standard; it's a high one.

16 A. Yes, it is, as it should be.

17 Q. Yes, it should be. But I also want
18 to be sure I won't be held to an impossible
19 one. And some jurors would feel that way.

20 I was very concerned Monday you made
21 come comment about the prosecution. What I was
22 hearing was prosecutor was hiding evidence in
23 that case.

24 A. No, I didn't feel that way. I just
25 thought -- I will be honest with you -- in that

1 particular case, knowing some details, number
2 one, that the attorney was court-appointed. You
3 know, the defendant came from obviously very low
4 socioeconomic background. I admired the
5 defense attorney who was appointed. I thought
6 for a case that to me was so open and shut in my
7 mind when I first heard the evidence, that, you
8 know, the attorney did an admirable job with
9 what I thought was a very difficult case to
10 him. I was amazed at how he constantly would
11 -- the point that you brought up about leaving,
12 maybe omitting certain parts of testimony, if it
13 benefited his client he would always make sure
14 that it did get admitted into the court
15 record. That is really where I was going with
16 that.

17 Q. You know, I was being sensitive and
18 perhaps I misunderstood what you were saying,
19 but, you know, I would hate to think that anyone
20 came from jury duty thinking that the prosecutor
21 was acting improperly.

22 A. No, I didn't see that. The thing
23 that struck me in the whole case was the fact
24 that I just put myself in the attorney's shoes
25 and said, my gosh, what must it be like for an

1 attorney to be assigned these types of cases and
2 to really get himself pumped up and do a good
3 job, you know. What the process is like that
4 to go through. Because this particular
5 attorney I thought did just a really good job.

6 Q. Do you remember who the defense
7 attorney or the prosecutor was?

8 A. You know, Judge McSpadden, I went to a
9 funeral about a year later, and he gave a eulogy
10 for a relative of my wife's that worked down
11 here. And that attorney was there. I remember
12 going up to him at the time. I can't think of
13 his name right now, but I remember going up to
14 him, here it was a year later, I said, "I served
15 on a jury and you were the court-appointed
16 attorney and I was struck by the job that you
17 did." He probably didn't even remember the
18 case. He said: "Well, thank you."

19 Q. You know, as we talked yesterday about
20 the business of leaving out parts of a statement
21 and the defense having the right to put things
22 in, you know, in criminal cases it's not always
23 a two-way street. If I leave something out,
24 they have the right to put it in. But if the
25 judge, if they want something in or the judge

1 rules that something should stay out, I don't
2 have the reciprocal right to be sure it comes
3 in.

4 MR. STAFFORD: Your Honor, I think
5 that is misleading. If the law does not allow
6 it in, it does not allow it in. And for her to
7 indicate to this juror that she has been picked
8 on or the State has been picked on, I object.

9 THE COURT: You may reword it.

10 BY MS. DAVIES:

11 Q. That was poorly worded. I think my
12 point is like discovery. We are all here --
13 well, I am not expressing this very well. But,
14 for instance, I am sure through your business
15 you are familiar with in civil cases the
16 discovery process, where both sides reveal
17 everything. In the criminal courthouse, it
18 doesn't work quite the same way. I am obligated
19 to reveal things to the defense about the case,
20 they do not, there is not a reciprocal right of
21 discovery on my side. As far as things being
22 left out of a statement, I guess I wanted to
23 make clear that if there are times that things
24 may be omitted for reasons other than that the
25 statement was omitted. It may be that the

1 defense objected to particular things being
2 admitted in front of the jury. The judge agreed
3 and said this part is going to be left out, the
4 jury is not going to hear this at the defense
5 request. And I just, because we got into that
6 so much yesterday, I don't want to always take
7 the hicky, hey, we are not hearing this because
8 she doesn't want us to. You understand there
9 could be different reasons for that?

10 A. Sure.

11 Q. You mentioned -- one of the things on
12 this questionnaire is about you had answered one
13 of these that agreed that capital punishment was
14 justified only for premeditated murder. Now
15 that we have talked about the fact that
16 premeditation is not involved, do you still feel
17 that way, or is the intentional murder
18 sufficient in your mind?

19 A. Well, by definition, Your Honor, if I
20 understood your talk to us yesterday, the State
21 of Texas basically came up with the term of
22 capital. This isn't a nation wide?

23 THE COURT: This is the legislative
24 scheme.

25 A. Exactly. I mean, are there states in

1 the union, I don't know, where premeditated is
2 still a crime punishable by death?

3 THE COURT: I believe there are some
4 states that use the term, but I don't know about
5 punishable by death. Anybody want to jump in
6 here?

7 MS. DAVIES: I am not certain which
8 states.

9 A. If your question is do I understand
10 the difference today in the State of Texas
11 between premeditated murder and capital, I think
12 so. I think that came across pretty good.

13 THE COURT: Premeditation is not a
14 part of our statutes whatsoever.

15 A. Right.

16 THE COURT: The distinction we had
17 basically been talking about is between murder
18 and capital murder and what such words as intent
19 or intentionally mean as opposed to premeditation.

20 BY MS. DAVIES:

21 Q. I had suggested that one can form the
22 intent to kill very quickly. Do you agree with
23 that?

24 A. I think you made a good point with
25 that. I did.

1 Q. In your mind, would it be more
2 serious, a worse killing, worse murder if it was
3 planned ahead as opposed to one that was carried
4 out intentionally but somewhat a spur of the
5 moment decision?

6 A. It might be.

7 Q. What is your thinking there?

8 A. Again, I think it would have to depend
9 on the circumstances of the case. It could
10 be. It could be -- in my mind it could be just
11 premeditation as a layman, that is pretty
12 heinous crime to me, you know, to think about,
13 contemplate and execute a plan to take
14 somebody's life. Prior to coming in here
15 yesterday, I mean, to me that was the top of the
16 list.

17 Q. And even for you, though,
18 premeditation -- I would suggest that you could
19 have premeditation in a relatively short period
20 of time, too.

21 A. I am saying that you made me aware of
22 that yesterday. Prior to yesterday, I have
23 always been one that thought premeditated murder
24 was, you know, at the top of the list, to
25 actually think about, plan and execute your plan

1 and take someone's life. That has always been
2 in my mind the number one. But some light was
3 shed on that yesterday for me.

4 Q. You mentioned earlier -- and I can't
5 remember what the judge was talking about that
6 you said something about that mitigating
7 evidence would be important. And, obviously, as
8 you are reading over those questions at the
9 punishment stage it's something we would expect
10 all jurors to consider, whatever evidence there
11 might be. Tell me, if you can, what it was you
12 had in mind in terms of what you think of as
13 mitigating. What would -- if things come to
14 your mind as being particularly important in
15 downgrading a defendant's blameworthiness?

16 A. Downgrading his blameworthiness. I
17 think probably his family background, how he was
18 raised, whether he was abused. I think those
19 things would be information that I would want to
20 hear, I mean, if, you know.

21 Q. And if you heard that kind of
22 information, certainly it's clear that you would
23 be expected to consider that. We are not going
24 to ask you how you would weigh any particular
25 aspect because I would hope you would need to

1 hear it in context to make that decision. Do
2 you feel like mitigation of that type, if there
3 was any evidence at all that would mitigate such
4 as you described, in your mind would that always
5 indicate that someone of that type should not
6 get the death penalty?

7 A. You used the word always. No. My
8 answer would be no. I think I would try to just
9 keep an own mind about that and form that
10 opinion based on that information at that time.
11 Always, I don't think, so.

12 Q. If I bring you the evidence that
13 convinces you beyond a reasonable doubt, would
14 you be able to put your name on a verdict that
15 was going to result in the death penalty?

16 A. I think so, yes.

17 Q. Thank you. Did we talk about
18 self-defense?

19 A. No.

20 Q. I don't remember. We have talked to
21 so many people, I am losing track of what I have
22 talked to different ones about. Anytime we are
23 talking about a murder case, self-defense is one
24 that comes to most people's mind as a
25 possibility. Do you feel like we each have the

1 right to defend ourselves?

2 A. Yes.

3 Q. Or to defend another? Whether it's in
4 your store or your home or out in the parking
5 lot. The law certainly does agree with you,
6 with us, that self-defense is appropriate as
7 long as it is used in an appropriate manner
8 within the limits of the appropriate degree of
9 force and immediately necessary. Sometimes the
10 notion of self-defense gets a little garbled,
11 though, and that is why I want to bring it up.
12 For example, someone goes into the convenient
13 store to rob someone, to rob the clerk. They go
14 in with no intent to kill. They go to commit a
15 robbery. They go in with a gun, and the clerk
16 pulls a gun from under the counter, refuses to
17 turn over the money and says drop your gun.
18 Instead, the robber shoots the clerk and then
19 tries to claim self-defense, saying I had to
20 shoot him, he pulled a gun on me. What is your
21 reaction to that?

22 A. My gut feeling is the assailant got
23 what he deserved. In other words, he pulled, he
24 had a gun, the clerk pulled a gun, a shooting
25 took place, and the assailant was killed. Was

1 that self-defense? I don't think so.

2 Q. The clerk. Let me be sure we are
3 talking about the same.

4 A. The clerk pulled a gun and shot the
5 assailant that had a gun. Was that
6 self-defense? In my mind, no, I don't think
7 so.

8 Q. You don't think the clerk would have
9 the right to defend himself?

10 A. Yes. I don't think the -- if the
11 clerk were shot and the other person were taken
12 to trial the other person could plead
13 self-defense, no, I wouldn't buy that at all.

14 Q. And that is because he was acting
15 unlawfully to begin with?

16 A. Exactly. And the clerk was defending
17 his property and his day's take or whatever.

18 Q. The law would agree with you
19 completely. You have to be acting lawfully to
20 claim self-defense. The clerk would have the
21 right to protect himself, or the manager who was
22 in the back room would have the right to come
23 out and protect the clerk.

24 A. With a gun, yeah.

25 Q. The procedure on this -- you did

1 punishment in your other trial, so you are
2 familiar with that first stage of trial. You
3 only hear evidence that relates to the
4 particular offense that is on trial. For good
5 reason. All the things about the background
6 really are not relevant. A person shouldn't be
7 convicted for what they have done before but for
8 whether we can bring the evidence to convince
9 you that he is guilty of the capital murder that
10 is on trial. You hear that evidence, the
11 judge's instruction, the attorneys' argument, go
12 back and deliberate. And usually I explain to
13 people that we never expect an instantaneous
14 verdict. And given your experience, I think
15 you can certainly understand that. It's called
16 deliberation because you do go back there and go
17 through all that evidence and have to try to
18 reach a consensus, a unanimous verdict. It's
19 only after you have come back with a verdict of
20 guilty of capital murder that you even get to
21 this second stage of trial and those two
22 questions. Now, I think we have touched on the
23 fact that sometimes there may not be any
24 additional evidence. And I might very well be
25 asking you to answer those questions just based

1 on those facts. Other times there can be more
2 evidence. It can be from the state or from the
3 defense if they choose to bring in evidence, but
4 you really can not ever require them to do so.
5 Background, past convictions, character, good or
6 bad, you know, if they chose to do so they could
7 bring in information he was a deacon of the
8 church, an honor student and good employee, you
9 know, either way, you would consider all the
10 evidence at the punishment stage, you would
11 consider both the evidence you had heard about
12 the offense that had been committed, the capital
13 murder, and the information that you hear about
14 this person's background. You take that same
15 evidence and you examine it two different
16 times. Say you look at it twice because you are
17 going to have a different measure. You are
18 going to re-weigh it, depending on the focus of
19 the question. That first question focuses on
20 probability of future dangerousness. Some
21 people come in here and say that is crystal ball
22 gazing. When you are talking about human
23 conduct you can't ever answer that question, how
24 can you ever be convinced beyond a reasonable
25 doubt as to what somebody is going to do in the

1 future. How do you feel about that?

2 A. Well, I will just go back to the case
3 I sat on. The person's background had a lot of
4 weight for me. The person was habitual in the
5 commission of the crime, going back to age
6 thirteen, fourteen years old, where he had a
7 history of it. Been in and out of jail. I
8 think he was in his twenties at the time of this
9 case. It impacted me. This is somebody,
10 obviously, that, you know, had not been
11 rehabilitated at all and shouldn't be on the
12 streets, and it impacted me as far as the
13 sentencing phase of it. No question about it.

14 Q. Am I hearing you correctly, then, to
15 say that kind of information would assist you in
16 answering that question?

17 A. Absolutely. Absolutely. The other
18 side of the coin is your extreme or maybe
19 non-extreme, if the person were a deacon in the
20 church, Boy Scout leader, National Honor Society
21 in school, that would also influence me, too,
22 sure would.

23 Q. Given evidence, do you feel like you
24 could be convinced, having enough information to
25 answer that question?

1 A. Yes.

2 Q. It talks about probability that a
3 defendant would commit criminal acts of
4 violence. Acts of violence that would
5 constitute a continuing threat to society.
6 Doesn't say are you convinced this person is
7 probably going to kill again.

8 A. No, it didn't.

9 Q. And that is what I want to know about
10 what your feeling on that is. To your way of
11 thinking, are there criminal acts that are a
12 continuing threat to society?

13 A. No question.

14 Q. Other than murder?

15 A. Absolutely.

16 Q. For some people, offenses like
17 burglary, or robbery.

18 MR. STAFFORD: I object to her trying
19 to commit him to burglary. Burglary by
20 definition is not a violent act unless a violent
21 act is committed in the process of burglary.
22 The act of committing burglary is not a violent
23 act. I object to her trying to suggest to this
24 juror that it is.

25 THE COURT: I don't think she has

1 suggested yet. I am listening for it, though.

2 BY MS. DAVIES:

3 Q. I think that what I said that for some
4 people, because certain offenses such as robbery
5 or burglary, because they have the potential for
6 violence, in their mind they would include them
7 as crimes of violence that would be a continuing
8 threat.

9 A. I would say yes. I would agree with
10 that could be as you put it.

11 Q. Not always?

12 A. Not always. Could be. Burglary to
13 me, I mean, there is a lot of violence could
14 take place in a burglary. You just cited a case
15 or an example where somebody walked in and put a
16 gun on somebody and asked for their money and
17 they came from behind the counter with a gun and
18 shots were fired and somebody was killed. It's
19 pretty violent. Yes, it could.

20 Q. But, obviously, there are other times
21 that it wouldn't be. If you answered -- of
22 course, obviously, twelve jurors would have to
23 unanimously agree that question number one
24 should be answered yes before you would ever
25 even get to the second question. Would you --

1 well, let me paraphrase that second question. I
2 don't want to take too many liberties with it.
3 I am paraphrasing it. I read it as basically
4 it's saying look at the evidence again now, be
5 sure you haven't forgotten to look at all the
6 mitigating evidence that is there. And also it
7 says including the circumstances of the
8 offense. Basically you are going to weigh the
9 mitigating circumstances against what may be
10 aggravating circumstances and decide whether
11 there is enough mitigating evidence there that
12 you think the guy should get a life sentence
13 instead of the death penalty.

14 A. That is the way I read it.

15 Q. That may be entirely too commonsense
16 an interpretation because it doesn't have all
17 the -- but that is what it looks like.

18 A. I think you zeroed in on it, yes.

19 Q. But it talks about if you are asked is
20 there sufficient mitigating circumstances. So I
21 am wanting to know could there be a case that
22 there is some mitigating evidence that you might
23 weigh that and think, yeah, that is mitigating,
24 there is some sad stuff here, and I am going to
25 consider it, but I don't weigh that enough, I

1 don't think it offsets his moral culpability for
2 this offense. I am going to answer this
3 question no because I think he should still get
4 the death penalty despite the sad childhood, the
5 deprived background, whatever. Can you see
6 that ever happening?

7 MR. STAFFORD: I think she is trying
8 to get him committed to a certain fact situation
9 as she has objected to me previously, and I so
10 object.

11 THE COURT: Sustained. Rephrase your
12 question.

13 BY MS. DAVIES:

14 Q. If there is some mitigating evidence,
15 are you always going to answer that question
16 yes?

17 A. No. If there is some mitigating
18 circumstances, it would have to depend on what
19 they are. What are they. As it relates to
20 what has happened, you know in this incident.

21 Q. Sometimes you would answer, even in
22 the light of some mitigating evidence, you can
23 see yourself sometimes answering that question
24 yes and sometimes no?

25 A. I sure can.

1 Q. Even though if you answered it no you
2 would know the death penalty was going to
3 result?

4 A. That's correct.

5 Q. You could live with that if you had
6 been convinced of that?

7 A. Yes. Yes, I could.

8 Q. Thank you. I think I have kept you
9 long enough. I will pass you unless you have
10 some questions of me. Was there anything you
11 wanted to ask me?

12 A. I can't think of anything.

13 EXAMINATION BY THE DEFENSE

14 BY MR. STAFFORD:

15 Q. My turn. What kind of broker sales?

16 A. Insurance.

17 Q. Oh, insurance. What is the name of
18 the company?

19 A. I work for myself. I am it.

20 Q. Tell me how that works. I mean, you
21 go out, you have a bunch of companies you
22 represent?

23 A. Right.

24 Q. You get the cheapest rates, the best
25 rates?

1 A. I don't go around and get the cheapest
2 rates. I try to find the best companies I can
3 to represent my client base I have. I get
4 appointed with these companies.

5 Q. What is your client base basically?

6 A. Personal line, life insurance,
7 annuities.

8 Q. Do individuals like us come to you, or
9 are you usually dealing with bigger companies?

10 A. No, most of my business is client
11 based individuals.

12 Q. So citizens on the street can come to
13 you as an independent broker and say I need
14 annuity or life insurance?

15 A. Absolutely.

16 Q. Do you get into car insurance as well?

17 A. No.

18 Q. Just basically life and annuities.
19 No hospital?

20 A. Yes. Personal line. That would be
21 hospitalization, Medicare supplement insurance
22 for older people, life, all types of life
23 products, term, whole life, annuities.

24 Q. How did you get from the printing
25 company into insurance? I notice you were the

1 owner of a printing company before this.

2 A. I had a small printing company in
3 Austin, Texas. We were commercial shop doing
4 the normal business card, letterhead, you know,
5 type of business. Small. Realizing that that
6 was extremely competitive, I mean, everybody
7 that opens up a print shop. These franchises
8 that you have, that is what they start out
9 doing. I tried to take a little different
10 direction with the company. I wanted to find a
11 specialty item that we could manufacture, and it
12 became index tabs. I bought index tabbing
13 equipment and became a jobber printer. In
14 other words, we wound up becoming a print shop
15 for other print shops. We manufactured index
16 tabs, and if a printer had a program for the
17 University of Texas, for instance, that needed
18 index tabs put into a bindery he would come to
19 me, I would make them for him. Then a big
20 company in town came to me and said we like very
21 much what you are doing, we would like to either
22 buy you out or go into competition with you.

23 Q. Sounded good to you at the time?

24 A. I sold the company.

25 Q. Okay. What did you do before that?

1 A. Prior to that, I was a manufacture's
2 representative in oilfield products, steam
3 turbines and all types of pumps and valves back
4 during the good times in Houston.

5 Q. The boom area?

6 A. Yeah.

7 Q. How did you get from Australia to
8 North Carolina, South Carolina, yeah, to North
9 Carolina?

10 A. My father was a career serviceman.

11 Q. Oh, was he?

12 A. Yes.

13 Q. What branch?

14 A. The old Army Air Corps and then
15 regular Air Force.

16 Q. You got to travel throughout the
17 world, I guess, as a kid, pretty much?

18 A. A lot.

19 Q. Which was your least favorite place to
20 live?

21 A. Fort Bragg, North Carolina.

22 Q. I was at Fort Jackson, South Carolina.
23 That was bad enough.

24 How would you describe your
25 relationship with your father?

1 A. My father and I didn't have -- we
2 didn't have the best relationship. I mean, my
3 father was not there for me a lot when I was
4 growing up.

5 Q. Do you think that affected you later
6 in life, or do you see how?

7 A. I think it had a very positive effect
8 on me later in life.

9 Q. Can you see in other situations with
10 with other individuals that could be negative?

11 A. Absolutely. Mine was negative when I
12 was young. It was very negative. My father
13 and mother divorced. That was very
14 unpleasant. There were four of us in a
15 stepladder.

16 Q. Where did you fall?

17 A. The oldest. I had two sisters that
18 were born in Australia after me, and then I had
19 a brother that was born in the States.

20 Q. How old were you when your father and
21 mother divorced?

22 A. I was nine years old.

23 Q. Were you ever adopted or anything
24 later on in life?

25 A. No.

1 Q. Ever known any kids that were adopted?

2 A. Absolutely.

3 Q. Do you think sometimes -- have you
4 ever noticed that sometimes adopted kids have
5 worst times of adjusting to certain situations
6 than kids who are raised in what we call--

7 A. I think in certain cases they do.

8 Q. What basic religion were you raised in
9 as a child?

10 A. Catholic.

11 Q. Are you still fairly an active
12 Catholic, or how would you describe your
13 participation now in religion?

14 A. On a personal basis, I would say I am
15 fairly active.

16 Q. Since the church has taken a public
17 stand against the death penalty, how do you
18 reconcile that? I assume that you feel like
19 it's a personal attitude with you.

20 A. I do.

21 Q. Same way you think abortion, death
22 penalty, all that should be an individual basis,
23 the church stay out of it?

24 A. When I went off to college as a young
25 man, my mind got opened up to a lot.

1 Catholicism issues, I don't know if anybody in
2 here -- I was raised in the Catholic faith. I
3 was raised very staunch Catholic, I was an altar
4 boy, I went to mass every day when I was growing
5 up as a young man. I wanted to be a priest. I
6 went through all that. And I went off to
7 college, and my mind was expanded, and all of a
8 sudden a lot of the dogma of the church didn't
9 sit well with me.

10 Q. You and I are about the same age, so
11 we were in the sixties when things were
12 turbulent.

13 A. Absolutely.

14 Q. We saw a lot of changes.

15 A. Tremendous amount of change. I faded
16 away from the church during the sixties.

17 Q. Seems like the circle is kind of
18 coming back around to a degree?

19 A. Right.

20 Q. Sixties were the years of anti-death
21 penalty. And now it's coming back.

22 A. Right.

23 Q. I know you gave it some thought last
24 night, but do you ever read a paper ever now and
25 then about someone doing a dastardly deed and

1 say what in the world are we going to do with
2 these people? If you were king for the day, do
3 you think you could come up with some formula or
4 some law or some formula for these horrible
5 people who do horrible things, or have you ever
6 thought along those lines?

7 A. I don't think I could come up with
8 anything.

9 Q. You made an interesting point about
10 your job, that you are in control of your own
11 destiny. One of the things that you like about
12 it. Expand on that a little bit for me.

13 A. I thought when I put it down it was
14 pretty self-explanatory. I work when I want to
15 work. I work as hard as I want to work. I work
16 as late as I want to work. If I want to take a
17 day off and go fishing, I can. I am at a point
18 in life now, you mentioned we are about the same
19 age, I assume you are heading into the big 50.

20 Q. Getting real close.

21 A. My daughter got married last
22 weekend. My son got married a year and a half
23 ago. It's my wife and dog and myself. And my
24 wife has fifteen years with a large
25 corporation. She will be retiring in five more

1 years. We have both worked hard. I can control
2 my own destiny doing what I am doing right now.
3 If I want to take a few days off and go to the
4 wedding in San Antonio that my daughter was
5 involved in and make a little vacation out of
6 it, I can.

7 Q. What is your handicap?

8 A. About six.

9 Q. Ain't bad.

10 A. Not too bad.

11 Q. Who was the lady that worked here that
12 passed away?

13 A. Her husband passed away.

14 Q. What were their names? Do you recall?

15 A. Bruce and Cynthia.

16 THE COURT: Burns.

17 A. Right. Bruce is the sibling on my
18 mother-in-law's side of the family.

19 Q. He was here for years. He was a nice
20 guy.

21 THE COURT: I don't know if you
22 attended that funeral. McSpadden gave the
23 eulogy for Sherman Ross.

24 Q. He was with Sherman for years and
25 years.

1 A. That is him. I mentioned to you
2 Judge McSpadden did the eulogy, and the lawyer
3 that represented the young man was there.

4 THE COURT: Everybody was there.

5 A. The first time I had seen him. I
6 remember walking up to him and just, you know,
7 saying I thought you did an admirable job for a
8 pretty open and shut case, I thought.

9 Q. We kind of briefly talked about that
10 yesterday, that you might be on a capital murder
11 jury where the guilt and innocence is rather
12 open and closed, rather a foregone conclusion,
13 that the case may be tried for punishment,
14 punishment only. And we have had jurors who
15 have been kind of upset that we entered a plea
16 of not guilty to what they thought was such a
17 whale, should have went ahead and bellied up to
18 the bar, admitted your guilt and let's get on
19 down to brass tacks. Do you think if that
20 happened you would hold it against us if we
21 entered a plea of not guilty and made the state
22 prove it to you beyond a reasonable doubt? Do
23 you have any intellectual problems with that at
24 all?

25 A. Intellectual problems? I guess the

1 way you tabled that question, I would almost
2 feel like you wouldn't be doing your job unless
3 you did that, especially in a situation like
4 this.

5 Q. Often what I call the real crux of the
6 case or the -- not that the guilt and innocence
7 stage is not an important part, it is, but the
8 punishment stage is where the difficulty not
9 only for you to make these important decisions
10 but for what kind of evidence we bring you and
11 how you weigh it. You can appreciate that?

12 A. Absolutely.

13 Q. As far as issue number two is
14 concerned, I mean, number one, I'm sorry. Let
15 me suggest to you, that since you were on a
16 trial, they have come out with a definition now
17 of what they call reasonable doubt. Now, there
18 will be some other charges that, of course, says
19 that the State doesn't have to prove its case
20 beyond all doubt. It's based upon a reasonable
21 doubt. But now the legislature has come up with
22 basically a reasonable doubt is a doubt based
23 upon reason and common sense after careful and
24 impartial consideration of all the evidence in
25 the case. It's the kind of doubt that would

1 make a reasonable person hesitate to act in the
2 most important of his own affairs. Proof beyond
3 a reasonable doubt, therefore, must be proof of
4 such convincing character that you would be
5 willing to rely and act upon it without
6 hesitation in the most important of your own
7 affairs. And you will be able to take that
8 back. And it's going to be applicable to this
9 issue number one as far as predicting what you
10 consider the probability that a person would
11 commit future acts of violence in the future
12 that would be a continuing threat to society.

13 Let me ask you this: Do you think
14 society includes prison society?

15 A. --.

16 Q. That is in context with that.

17 A. Do I think society includes prison
18 society in context with that?

19 Q. Issue number one. Or do you think
20 they are worried about whether he is going to
21 commit future acts of violence to us in the free
22 society?

23 A. Do I think society is worried?

24 Q. When you read that, when you approach
25 the answer to that, answering that, would you be

1 concerned about whether he is going to be
2 violent in prison or whether he would commit
3 future acts of violence to be a threat to what I
4 call free society, us?

5 A. Sounds like several questions in
6 there. I mean, the one I hear would it be
7 important to me whether he could continue to be
8 a threat to society, would that be important to
9 me? Is that the question?

10 Q. No, my question is keyed on the word
11 society. When you read that, what is your first
12 impression? You are thinking about prison
13 society or free society?

14 A. Which do you want me to think of?
15 Prison or?

16 Q. No, I totally have everybody confused,
17 including myself. When you read that question,
18 what does society mean to you?

19 A. Society means you and I and the rest
20 of the people in the room.

21 Q. Would it include prison when you are
22 approaching answering that question?

23 A. I think prison is part of our society.

24 Q. That is where I guess I should have
25 asked and made things a lot simpler. I guess

1 what I am trying to find out from you, because
2 you made a comment to the judge and the
3 prosecutor, that one of the things that kind of
4 bothered you from the other case is that the
5 person was not going to serve very long period
6 of time.

7 A. I don't remember my exact question to
8 the judge at the time, but my concern was, you
9 know, I remember he was from Oklahoma, and he
10 had Oklahoma memorabilia all over the place, and
11 we talked a little about that, and I think he
12 had practiced up there some before coming down
13 here, I remember making the comment to him that
14 something to the effect that I bet people in New
15 Hampshire wound up doing a lot more time than
16 people in Texas do, and he pretty well agreed
17 with that, you know, that their situation up
18 there was quite a bit different than ours.
19 Smaller populated state and crime was nowhere
20 near the problem. We were at the height of it
21 then. It was constantly in the papers all the
22 time, early release and prisons full, Harris
23 County not being paid enough funds, you know, by
24 the rest of the states. And my concern was,
25 because when we got into the sentencing portion

1 of this thing, the numbers that were thrown
2 around in there, we could give anything from 25
3 years to a hundred years, and people were
4 wanting to give twenty-six. I never went
5 through a process like that. It was
6 unbelievable, all these different numbers that
7 they were coming up with. We arrived at
8 seventy-seven. Again, that was -- it was one of
9 those things, like I said to the judge when we
10 went into the chambers after it was over with,
11 we came up with seventy-seven, "Have you ever
12 had a jury come up with that odd number?" He
13 said, "No, I can't remember." I was serious. I
14 said, "What amount of time could this individual
15 serve on a sentence of seventy-seven years?"

16 Q. Let me -- the reason I am trying to
17 get into this area of discussion with you is I
18 have had individuals tell me: Well, you know,
19 the death penalty, he is never going to die
20 anyway, and if he gets life he is going to get
21 out too quick, so I am just going to vote for
22 the death penalty just because I know he ain't
23 going to die. Now, Our Honor, as you know, is
24 going to tell you if you are on this jury that
25 you are not supposed to take into consideration

1 what the parole board is going to do.

2 A. Could I make a comment on what you
3 just said there? Could I comment on something
4 you just said?

5 Q. Yes.

6 A. I could never vote for the death
7 penalty simply because I know he is not going to
8 get it anyway.

9 Q. You know that he wouldn't die?

10 A. I couldn't vote for the death penalty
11 simply because I know he won't die. I couldn't
12 do that. There is no way I could do that.

13 Q. Let me ask you this. How about you
14 are in a situation, and you are bothering me
15 because it appears to be a concern of yours
16 about early release. Do you think approaching
17 life imprisonment, considering the court's
18 instruction, when you were considering life
19 imprisonment, and if you thought life
20 imprisonment was the proper sentence based upon
21 the evidence, how would the fact of what you
22 have been telling me affect the way you would
23 answer these questions?

24 A. I wouldn't consider, if I voted for
25 life imprisonment, I wouldn't consider the fact

1 that there is a possibility that the individual
2 might be released early. If I found out at a
3 later time that the individual, it might bother
4 me at that time, but it wouldn't bother me in
5 making my decision for a life sentence versus
6 death.

7 Q. That is what I need to know.

8 A. I think any layman living in this
9 society that we live in right here has a concern
10 for early release. I think if you don't, I
11 think something would be wrong with you. But I
12 would never convict somebody--

13 Q. Or sentence them to death?

14 A. Absolutely. Not simply because I know
15 that they are not going to get the penalty
16 anyway. And the same on the other side of the
17 coin. I would not have a concern that at the
18 time I would be making this monumental decision
19 that how much time the party would actually wind
20 up having to do with a life sentence.

21 Q. So you could follow the court's
22 instruction and not let that play a factor in
23 your decision?

24 A. Absolutely.

25 Q. Okay. That is fair to me. That is

1 what I want to hear.

2 A. But I might be upset later on.

3 Q. I understand.

4 A. I would reserve that.

5 Q. On issue number one, as far as
6 probabilities are concerned, you made an
7 interesting comment. I think, for example,
8 this may be a poor excuse, I mean, a poor
9 analogy, but I guess if you went to the race
10 tracks a lot or dog track a lot, or even if you
11 followed golf a lot.

12 A. I do that.

13 Q. You know who the guys are and you can
14 pretty well, based on how they have been
15 shooting, what possibilities or probabilities
16 they are going to do in the next tournament or
17 what the horse is going to do based upon their
18 track record. I guess where I am going: Do
19 you think, for example, just because someone has
20 committed five or six auto thefts with no
21 violence involved, is that an indication to you
22 that he is going to go out and commit future
23 acts of violence? Or do you think just because
24 someone commits a non-violent crime there is a
25 probability he is going to commit future acts of

1 violence that would be a continuing threat to
2 society? Or can you differentiate between
3 non-criminal conduct and violent criminal
4 conduct?

5 A. I think I can differentiate. I would
6 also think that in the case of somebody
7 continually committing non-violent crimes, I
8 think if you want to talk about odds and going
9 to the horses and what have you, I think
10 probably for me somebody that enjoys competition
11 and understands odds, I think the odds would be
12 heavily in favor that violence sooner or later
13 in this person's life is going to take place if
14 they continually keep committing non-violent
15 crimes. I would say the odds are pretty good
16 that violence at some point in the future is
17 going to take place for that person. Keep
18 stealing automobiles, sooner or later you are
19 going to steal somebody's car that happens to be
20 near by and has a gun and maybe shoots you. You
21 know. Keep stealing cars and you might be
22 involved in a high speed chase that gets you
23 shot. You know. I think constant, somebody
24 committing constant non-violent crimes I think
25 eventually the odds are going to be in their

1 favor that violence will take place.

2 Q. Will occur?

3 A. Yes. But I don't necessarily think
4 that people committing non-violent crimes are
5 going to wake up tomorrow morning and commit
6 violent ones either, just decide let's graduate
7 from cars now to murder, no.

8 Q. Do you think his prior criminal record
9 as far as his conduct in prison, if you are
10 sitting there evaluating: Okay, life in prison
11 means life in prison, I am concerned about how
12 he is going to conduct himself in prison,
13 whether he is going to be a threat to the
14 guards, to other inmates, would his prior record
15 from prison aid you as to his conduct in prison
16 if it showed that he had never been in trouble
17 much or no violence? Would that have any weight
18 on you at all, or would you consider it or not
19 consider it?

20 A. I could consider it, yes.

21 Q. We may bring you psychologists to
22 testify on the issue of probability, not
23 particularly much as he is concerned but about
24 people in general. They have conducted studies
25 and written articles, experts have, and you may

1 hear about all these articles and these studies
2 as to what the medical profession thinks about
3 predicting future dangerousness. Do you think
4 you would automatically disregard what that
5 testimony is, or do you think you could give it
6 whatever weight you feel like it's worth?

7 A. I think I could give it whatever
8 weight I feel like it's worth.

9 Q. What do you feel about psychologists
10 who come in and testify on behalf of a
11 defendant? Leave a bad taste in your mouth?

12 A. No.

13 Q. Do you think they are the hired guns
14 of the defendant, that we are just getting them
15 to come down here to say what we want them to
16 say, or do you think they have their own code of
17 ethics?

18 A. Absolutely.

19 Q. Would it offend you?

20 A. I think they are as professional as
21 attorneys.

22 Q. We won't get into that. We all
23 appreciate that. I don't mean to make fun. I
24 gather also you would not be offended if you
25 determined that he got paid for coming down here

1 to testify?

2 A. I would hope so.

3 Q. Like police officers get paid for
4 coming to be on duty. If they are not on the
5 job, they get extra pay.

6 A. Jurors.

7 Q. You don't get much. You only get six
8 dollars.

9 A. \$12.50 the second day; isn't it?

10 Q. Once you get on, you may even get a
11 free lunch.

12 A. We got fed the last one.

13 Q. Did you?

14 A. Yeah.

15 Q. We've made a big heyday out of this
16 confession or statement. There has been
17 editorials both by the court and by the
18 prosecutor as to how the function that it works,
19 procedurally works. I can only state that if
20 for some reason Our Honor believes that a
21 certain portion of a statement is not admissible
22 you are not going to know about that anyway. It
23 will be done outside your presence if for some
24 reason based upon the law he doesn't think it
25 should be before you, has no bearing on this

1 case, probably will never be a factor that you
2 will never know. Also in the old days we used
3 to have what we call the voucher rule, that is
4 anything the State introduced they had to stand
5 by it and say that is what I believe. That rule
6 no longer applies. They can introduce the
7 whole statement and never get caught in that
8 trap. They just introduce the whole thing, and
9 then at the closing argument or whatever they
10 can say I don't believe this, the evidence
11 doesn't support it.

12 MS. DAVIES: I have to object to
13 that. If I said such a thing Mr. Stafford would
14 certainly be objecting.

15 THE COURT: Go ahead. Proceed.

16 BY MR. STAFFORD:

17 Q. What I am saying it's no longer the
18 voucher rule. I am not saying this prosecutor
19 is going to do that, I am just giving you a
20 general over view of the law. They don't have
21 to vouch for what they introduce. They can
22 introduce the whole statement.

23 A. When you say they don't have to vouch.

24 Q. Back in the old days they had what is
25 called the voucher rule. Basically if there

1 was a statement that raised the issue of
2 self-defense or some other factor that may show
3 that he is not guilty of it, if the state
4 introduced that showing that there was a defense
5 to it they had to live by it.

6 A. If a statement was introduced that
7 someone had pleaded self-defense?

8 Q. Right.

9 A. In the old days.

10 Q. If the state introduced it.

11 A. They would have to stand by it?

12 Q. Right. And then the legislature and
13 the courts finally realized that's kind of
14 ridiculous to hold them to that strict burden.
15 So now they did away with that rule.

16 A. Now what are they able to do?

17 Q. They can introduce the whole thing and
18 they are not bound by the voucher rule anymore.
19 They don't have to live by the issue of
20 self-defense. They have the right to come in
21 and say that ain't true, we don't believe that's
22 true.

23 A. They can introduce the statement
24 today?

25 MS. DAVIES: That is my objection. I

1 don't have the right to come in and say I don't
2 believe that is true.

3 THE COURT: Sustained.

4 BY MR. STAFFORD:

5 Q. They can introduce evidence to show
6 it's not true.

7 A. That a statement is not true?

8 Q. Whatever in the statement is not
9 true. I guess the bottom line is maybe the
10 voucher rule is no longer in. We will leave it
11 at that. But I do not believe, in all candor,
12 that there is going to be any trickery or hiding
13 in this case. I don't think either side of us
14 play that way. You are going to hear everything
15 that is relevant and it's going to be laid out
16 on the table for you. There are not going to
17 be any dark corners or secrets in this trial. I
18 hope you would understand that on both sides and
19 not hold it against either one of us. I am
20 sure, as you know from your previous trial, we
21 make objections. I assume they did at the
22 other trial; did they not?

23 A. Absolutely.

24 Q. I am probably going to be making
25 objections, and so shall she. Am I hearing that

1 you will assure me and my client that you are
2 not going to hold that against me if I make
3 objections?

4 A. Of course not. Again, I would feel
5 you would be rather remiss in your duty if you
6 went through the whole case without objecting to
7 something.

8 Q. The fact of -- you kind of briefly
9 talked to the prosecutor about this -- would the
10 fact that there are two dead bodies or two
11 deceased people, what is your -- am I starting
12 off behind the eight ball with you on that
13 factor as far as your opinions towards capital
14 murder are concerned, or do you think it would
15 be I am starting off the same level with you
16 whether there was one or two deceased people?
17 You know in this case there are at least two
18 from the pleadings.

19 A. The fact that there are two people
20 deceased, is that in my mind does that put you?

21 Q. Does that put me kind of behind the
22 starting gate somewhere, or am I still even if
23 you are on this jury?

24 A. I think right now today you are even.
25 Sure do.

1 Q. Does it bring out any -- I hate to use
2 the word bias with you, but the fact that there
3 are two deceased people bring out anything in
4 you that you can share with me or explain or
5 cause any ill feelings in you or any anger or
6 anything of that nature, just the fact that
7 there are two deceased people, individuals?

8 A. First thought that comes to my mind is
9 that I feel sorry for their families. That is
10 the first thought I have. Feel compassion for
11 the families of the people.

12 Q. As far as the mitigation issue is
13 concerned, unfortunately the law is written that
14 the State does not have any burden of proof on
15 that issue. The court will tell you that
16 neither one of us has the burden. But if I do
17 bring you evidence, will you listen to it and
18 will you give it whatever weight you think is
19 necessary?

20 A. Absolutely.

21 Q. Do you realize that just because you
22 have answered this issue yes does not
23 necessarily mean that you have got to answer
24 this question no, they each stand on their own
25 ground. Do you understand that?

1 A. I do.

2 Q. Just because you find that he is a
3 future danger does not necessarily mean that
4 there may not be some factor in his background
5 that reduces it? You can see the difference
6 between the two?

7 A. Absolutely.

8 Q. Are you of the opinion that future
9 dangerousness can be diagnosed like cancer or
10 broken bone by doctors or by psychiatrists? Or
11 do you think this is just a combination of
12 things?

13 A. Repeat that.

14 Q. Some individuals believe that future
15 dangerousness is something that you can just
16 diagnose, like you have got cancer, it's that
17 easy. Or do you think predicting future
18 dangerousness is a little bit more complex and
19 difficult?

20 A. I think it would be a little more
21 complex than cancer, but I also feel like that
22 psychologists and psychiatrists that are trained
23 in that area I think can make, with a certain
24 amount of certainty, future predictions about
25 patterns within human beings.

1 MR. STAFFORD: No further questions.

2 THE COURT: Step outside for just a
3 moment, please.

4 (The prospective juror leaves the
5 courtroom).

6 MS. DAVIES: The State will excuse Mr.
7 Gaffney.

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